No. 19-2207

In the

United States Court of Appeals

For the Fourth Circuit

DESMOND NDAMBI, MBAH EMMANUEL ABI, NKEMTOH MOSES AWOMBANG,
Plaintiffs-Appellants,

v.

CORECIVIC, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
(Richard D. Bennett, District Judge)

JOINT APPENDIX

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APPEAL,CLOSED

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #: 1:18−cv−03521−RDB

Ndambi et al v. CoreCivic, Inc.
Assigned to: Judge Richard D. Bennett
Case in other court: USCA, 19−02207
Cause: 29:201 Fair Labor Standards Act

Date Filed: 11/14/2018
Date Terminated: 09/27/2019
Jury Demand: None
Nature of Suit: 710 Labor: Fair Standards
Jurisdiction: Federal Question

Date Filed	#	Docket Text
11/14/2018	1	COMPLAINT against CoreCivic, Inc. (Filing fee $ 400 receipt number 84637033383.), filed by Desmond Ndambi, Nkemtoh Moses Awombang and Mbah Emmanuel Abi. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Summons, # 5 Civil Cover Sheet)(jf3s, Deputy Clerk) (Additional attachment(s) added on 12/11/2018: # 6 Complaint *scanning issues corrected*) (jf3s, Deputy Clerk). (Entered: 11/16/2018)
11/16/2018	2	Summons Issued 21 days as to CoreCivic, Inc.(jf3s, Deputy Clerk) (Entered: 11/16/2018)
11/28/2018	3	MOTION to Appear Pro Hac Vice for Daniel P. Struck (Filing fee $100, receipt number 0416−7695122.) by CoreCivic, Inc.(Berkowitz, Matthew) (Entered: 11/28/2018)
11/28/2018	4	MOTION to Appear Pro Hac Vice for Jacob B. Lee (Filing fee $100, receipt number 0416−7695158.) by CoreCivic, Inc.(Berkowitz, Matthew) (Entered: 11/28/2018)
11/28/2018	5	MOTION to Appear Pro Hac Vice for Rachel Love (Filing fee $100, receipt number 0416−7695174.) by CoreCivic, Inc.(Berkowitz, Matthew) (Entered: 11/28/2018)
11/28/2018	6	NOTICE of Appearance by Matthew D Berkowitz on behalf of CoreCivic, Inc. (Berkowitz, Matthew) (Entered: 11/28/2018)
11/29/2018	7	(FILED IN ERROR) AFFIDAVIT of Service for Summons and Class Action Complaint with Exhibits served on Corecivic, Inc. (Rebecca Gott, Intake Specialist) on 11/21/2018, filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi.(Sellers, Joseph) Modified on 11/29/2018 (bmhs, Deputy Clerk). (Entered: 11/29/2018)
11/29/2018	8	QC NOTICE: 7 Affidavit of Service filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi was filed incorrectly. ***Incorrect event was selected. Please refile using the event under Service of Process: Summons Returned Executed. It has been noted as FILED IN ERROR, and the document link has been disabled.* (bmhs, Deputy Clerk) (Entered: 11/29/2018)
11/29/2018	9	MOTION to Appear Pro Hac Vice for Stacy N. Cammarano (Filing fee $100, receipt number 0416−7699032.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	10	MOTION to Appear Pro Hac Vice for Robert S. Libman (Filing fee $100, receipt number 0416−7699077.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	11	MOTION to Appear Pro Hac Vice for Nancy L. Maldonado (Filing fee $100, receipt number 0416−7699091.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	12	MOTION to Appear Pro Hac Vice for Matthew J. Owens (Filing fee $100, receipt number 0416−7699108.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	13	MOTION to Appear Pro Hac Vice for Michael Hancock (Filing fee $100, receipt number 0416−7699122.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang,

		Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	14	MOTION to Appear Pro Hac Vice for Benjamin J. Blustein (Filing fee $100, receipt number 0416−7699131.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/29/2018	15	MOTION to Appear Pro Hac Vice for Deanna N. Pihos (Filing fee $100, receipt number 0416−7699145.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi(Sellers, Joseph) (Entered: 11/29/2018)
11/30/2018	16	SUMMONS Returned Executed by Desmond Ndambi, Nkemtoh Moses Awombang, Mbah Emmanuel Abi. CoreCivic, Inc. served on 11/21/2018, answer due 12/12/2018.(Sellers, Joseph) (Entered: 11/30/2018)
11/30/2018	17	PAPERLESS ORDER granting 3 Motion to Appear Pro Hac Vice on behalf of Daniel Struck. Directing attorney Daniel Struck to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	18	PAPERLESS ORDER granting 4 Motion to Appear Pro Hac Vice on behalf of Jacob B Lee. Directing attorney Jacob B Lee to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	19	PAPERLESS ORDER granting 5 Motion to Appear Pro Hac Vice on behalf of Rachel Love. Directing attorney Rachel Love to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	20	PAPERLESS ORDER granting 9 Motion to Appear Pro Hac Vice on behalf of Stacy Cammarano. Directing attorney Stacy Cammarano to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	21	PAPERLESS ORDER granting 10 Motion to Appear Pro Hac Vice on behalf of Robert S Libman. Attorney Robert S Libman will receive a separate email with the previously issued CM/ECF login and password. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	22	PAPERLESS ORDER granting 11 Motion to Appear Pro Hac Vice on behalf of Nancy Maldonado. Directing attorney Nancy Maldonado to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	23	PAPERLESS ORDER granting 12 Motion to Appear Pro Hac Vice on behalf of Matthew Owens. Directing attorney Matthew Owens to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	24	PAPERLESS ORDER granting 13 Motion to Appear Pro Hac Vice on behalf of Michael Hancock. Directing attorney Michael Hancock to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	25	PAPERLESS ORDER granting 14 Motion to Appear Pro Hac Vice on behalf of Benjamin Blustein. Directing attorney Benjamin Blustein to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
11/30/2018	26	PAPERLESS ORDER granting 15 Motion to Appear Pro Hac Vice on behalf of Deanna Pihos. Directing attorney Deanna Pihos to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 11/30/2018. (srds, Deputy Clerk) (Entered: 11/30/2018)
12/06/2018	27	NOTICE by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi *of filing Consents to Join Lawsuit of Ivan Chacon Chacon, Prudencio Ramirez and Javier Recinos* (Attachments: # 1 Attachment Consents)(Sellers, Joseph) (Entered: 12/06/2018)

12/07/2018	28	QC NOTICE: 27 Notice (Other) filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi was filed incorrectly. ***Please add the new plaintiffs (Filers) when prompted. They have been added for you this time but please add them in the future.* (bmhs, Deputy Clerk) (Entered: 12/07/2018)
12/10/2018	29	Consent MOTION for Extension of Time to File Response/Reply as to 1 Complaint, by CoreCivic, Inc. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Struck, Daniel) (Entered: 12/10/2018)
12/11/2018	30	ORDER granting 29 Motion for Extension of Time. Signed by Judge Richard D. Bennett on 12/11/2018. (bmhs, Deputy Clerk) (Entered: 12/11/2018)
12/12/2018	31	(FILED IN ERROR) Local Rule 103.3 Disclosure Statement by CoreCivic, Inc. (Struck, Daniel) Modified on 12/13/2018 (bmhs, Deputy Clerk). (Entered: 12/12/2018)
12/13/2018	32	QC NOTICE: 31 Local Rule 103.3 Disclosure Statement filed by CoreCivic, Inc. was filed incorrectly. ***The Local Rule 103.3 Disclosure Statement needs to be refiled and the corporate parent and/or affiliations need to be entered when the system prompts you. It has been noted as FILED IN ERROR, and the document link has been disabled.* (bmhs, Deputy Clerk) (Entered: 12/13/2018)
12/13/2018	33	Local Rule 103.3 Disclosure Statement by CoreCivic, Inc. identifying Other Affiliate ACS Corrections of Texas, LLC, Other Affiliate APM Ltd., Other Affiliate Avalon Corpus Christi Transitional Center, LLC, Other Affiliate Avalon Correctional Services, Inc., Other Affiliate Avalon Transitional Center Dallas, LLC, Other Affiliate Avalon Tulsa, LLC, Other Affiliate Carver Transitional Center, LLC, Other Affiliate CCA Health Services LLC, Other Affiliate CCA International LLC, Other Affiliate CCA South Texas, LLC, Other Affiliate CCA UK Ltd., Other Affiliate CoreCivic Government Solutions LLC, Other Affiliate CoreCivic, LLC, Other Affiliate CoreCivic of Kansas Holdings LLC, Other Affiliate CoreCivic of Kansas LLC, Other Affiliate CoreCivic of Tallahassee, LLC, Other Affiliate CoreCivic of Tennessee LLC, Other Affiliate CoreCivic TRS LLC, Other Affiliate Correctional Alternatives, LLC, Other Affiliate Correctional Mgmt., Inc., Other Affiliate EP Horizon Management LLC, Other Affiliate Fort Worth Transitional Center, LLC, Other Affiliate Green Level Realty, LLC, Other Affiliate National Offender Mgmt. Systems, LLC, Other Affiliate Prison Realty Mgmt., LLC, Other Affiliate Project South, Other Affiliate Rocky Mountain Offender Mgt. Systems, LLC, Other Affiliate Southern Corrections System of Wyoming, LLC, Other Affiliate SSA Baltimore Holdings LLC, Other Affiliate SSA Baltimore LLC, Other Affiliate Technical & Bus Inst. of America LLC, Other Affiliate Time to Change, Inc., Other Affiliate TransCor America LLC, Other Affiliate TransCor Puerto Rico Inc., Other Affiliate Turley Residential Center, LLC for CoreCivic, Inc..(Struck, Daniel) (Entered: 12/13/2018)
12/18/2018	34	NOTICE by Honore Otayema Lomenoje, Bokole Umba Dieu *Consent to Join Lawsuit* (Attachments: # 1 Attachment Dieu, # 2 Attachment Lomenoje)(Sellers, Joseph) (Entered: 12/18/2018)
12/18/2018	35	NOTICE of Appearance by Kenneth M Bernas on behalf of CoreCivic, Inc. (Bernas, Kenneth) (Entered: 12/18/2018)
01/11/2019	36	MOTION to Dismiss for Failure to State a Claim by CoreCivic, Inc. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Struck, Daniel) (Entered: 01/11/2019)
01/18/2019	37	MOTION for Extension of Time *(Unopposed)* by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Ivan Chacon Chacon, Bokole Umba Dieu, Honore Otayema Lomenoje, Desmond Ndambi, Prudencio Ramirez, Javier Recinos (Attachments: # 1 Text of Proposed Order)(Sellers, Joseph) (Entered: 01/18/2019)
01/22/2019	38	ORDER granting 37 Unopposed Motion for Extension of Time. Signed by Judge Richard D. Bennett on 1/22/2019. (bmhs, Deputy Clerk) (Entered: 01/22/2019)
02/01/2019	39	RESPONSE in Opposition re 36 MOTION to Dismiss for Failure to State a Claim filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Sellers, Joseph) (Entered: 02/01/2019)

02/08/2019	40	Consent MOTION for Extension of Time to File Response/Reply as to 36 MOTION to Dismiss for Failure to State a Claim by CoreCivic, Inc.. (Attachments: # 1 Text of Proposed Order)(Struck, Daniel) (Entered: 02/08/2019)
02/11/2019	41	ORDER granting 40 Consent Motion for Extension of Time. Signed by Judge Richard D. Bennett on 2/11/2019. (bmhs, Deputy Clerk) (Entered: 02/12/2019)
02/25/2019	42	MOTION to Appear Pro Hac Vice for R. Andrew Free (Filing fee $100, receipt number 0416−7855550.) by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Ivan Chacon Chacon, Bokole Umba Dieu, Honore Otayema Lomenoje, Desmond Ndambi, Prudencio Ramirez, Javier Recinos (Attachments: # 1 Attachment Continuation Page for 2.)(Sellers, Joseph) (Entered: 02/25/2019)
02/26/2019	43	MOTION to Certify Class *Conditionally and Issuance of Notice* by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi (Attachments: # 1 Memorandum in Support, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Text of Proposed Order)(Sellers, Joseph) (Entered: 02/26/2019)
02/27/2019	44	PAPERLESS ORDER granting 42 Motion to Appear Pro Hac Vice on behalf of R Andrew Free. Directing attorney R Andrew Free to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic−case−filing−registration. Signed by Clerk on 2/27/2019. (srd, Deputy Clerk) (Entered: 02/27/2019)
03/08/2019	45	REPLY to Response to Motion re 36 MOTION to Dismiss for Failure to State a Claim filed by CoreCivic, Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Struck, Daniel) (Entered: 03/08/2019)
03/12/2019	46	RESPONSE in Opposition re 43 MOTION to Certify Class *Conditionally and Issuance of Notice* filed by CoreCivic, Inc.. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Struck, Daniel) (Entered: 03/12/2019)
03/12/2019	47	MOTION for Leave to File *Supplemental Opposition to Plaintiffs' Motion for Conditional Certification and Issuance of Notice* by CoreCivic, Inc. (Attachments: # 1 Text of Proposed Order)(Struck, Daniel) (Entered: 03/12/2019)
03/26/2019	48	RESPONSE in Support re 43 MOTION to Certify Class *Conditionally and Issuance of Notice* filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi.(Sellers, Joseph) (Entered: 03/26/2019)
09/27/2019	49	MEMORANDUM ORDER GRANTING 36 Motion to Dismiss; DISMISSING w/prejudice 1 Complaint; DENYING AS MOOT 43 Motion for Conditional Certification and Issuance of Notice. Signed by Judge Richard D. Bennett on 9/27/2019. (hmls, Deputy Clerk) (Entered: 09/27/2019)
10/25/2019	50	NOTICE OF APPEAL as to 49 Memorandum and Order, Order on Motion to Dismiss for Failure to State a Claim, Order on Motion to Certify Class by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi. Filing fee $ 505, receipt number 0416−8312185.(Libman, Robert) (Entered: 10/25/2019)
10/28/2019	51	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 50 Notice of Appeal,. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms & Notices.(ko, Deputy Clerk) (Entered: 10/28/2019)
10/31/2019	52	USCA Case Number 19−2207 for 50 Notice of Appeal, filed by Mbah Emmanuel Abi, Nkemtoh Moses Awombang, Desmond Ndambi. Case Manager − Michael Radday (ko, Deputy Clerk) (Entered: 10/31/2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

DESMOND NDAMBI,
7717 Riverdale Rd.
New Carrollton, MD 20784
Prince George's County,

MBAH EMMANUEL ABI,
1431 Troon Ave.
Brunswick, OH 44212,

and

NKEMTOH MOSES AWOMBANG,
3505 W. 105 St. Apt. 303
Cleveland, OH 44111,

Individually and on behalf of all others similarly situated,
Plaintiffs,

v.

CORECIVIC, INC.,
2405 York Road, Suite 201
Lutherville Timonium, MD 21093-2264
Baltimore County,
Defendant.

Civil Action No. RDB 18 CV3521

CLASS ACTION COMPLAINT

1. Plaintiffs Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang (collectively, "**Plaintiffs**") individually and on behalf of all others similarly situated, by and through their undersigned attorneys, bring this action against Defendant CoreCivic, Inc. ("**Defendant**" or "**CoreCivic**") for failing to pay immigrants confined in civil detention at the Cibola County Correctional Center ("**Cibola**") their legally mandated wages as required by the Fair Labor Standards Act ("**FLSA**") and the New Mexico Minimum Wage Act ("**NMMWA**").

Plaintiffs also bring this action, individually and on behalf of all others similarly situated, against CoreCivic for unjust enrichment under New Mexico common law because it failed to pay Plaintiffs a fair and adequate wage, yet it received the value of their labor and retained the difference between the inadequate pay and the prevailing wage in Cibola County.

2. CoreCivic is among the oldest and largest for-profit corrections corporations in the United States. In 2017, CoreCivic reported $1.84 billion in revenue, with 48% from contracts with federal government agencies. CoreCivic owns and operates Cibola, a prison complex that has faced several recent scandals for mistreatment and inadequate care of prisoners and civilly detained immigrants. CoreCivic profits from its operation of Cibola by relying heavily on a captive workforce of civilly detained immigrants, including Plaintiffs, to perform labor necessary to keep Cibola operational and provide the services it is obligated to provide under the terms of its contract with Cibola County, New Mexico. The work includes tasks such as preparing and serving meals, cleaning the facilities, performing other janitorial tasks, performing laundry services, and operating the library and the barber shop. CoreCivic sometimes hires non-detainees who live in the surrounding community to perform the same work. If Plaintiffs did not perform this work, CoreCivic would have to hire more people from the surrounding community to keep Cibola operational and pay those additional workers the legally mandated wages, which would be substantially higher than the wages actually paid to Plaintiffs.

3. Despite the importance and necessity of Plaintiffs' work to CoreCivic's business, CoreCivic has always paid them less than the legally required wage for their work, and sometimes as little as one dollar per day. CoreCivic has contracted with Cibola County to operate a detention facility that holds civilly detained immigrants and to pay workers the

prevailing wage in the community to operate the facility. By suffering or permitting Plaintiffs to perform work at its facility and for its benefit while paying Plaintiffs well below the minimum wage and the prevailing wage in Cibola County, CoreCivic violates its service contract with the County and suppresses wages in the local labor market. CoreCivic's labor practices at Cibola render the company liable under the Fair Labor Standards Act, the New Mexico Minimum Wage Act, and the common law doctrine of unjust enrichment.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, *et seq*.

5. Independently, the Court has original jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), because at least one class member is of diverse citizenship from Defendant CoreCivic, there are more than 100 class members, and the aggregate amount in controversy exceeds $5,000,000.

6. Additionally, the Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiffs' pendent state law claims under the New Mexico Minimum Wage Act and unjust enrichment under New Mexico common law.

7. This Court has personal jurisdiction over Defendant pursuant to Md. Code Ann. § 6-102 because Defendant is organized under the laws of Maryland.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) and Md. Code Ann. § 6-102 because Defendant is organized under the laws of Maryland and therefore resides in this District.

PARTIES

Plaintiffs

9. Plaintiff Desmond Ndambi is an adult resident of New Carrollton, Maryland. Mr. Ndambi has filed a consent to join this action. *See* Exh. 1.

10. Mr. Ndambi was an employee of CoreCivic, as that term is defined by the FLSA, 29 U.S.C. § 203(e)(1) and (g), and the NMMWA, NM Stat. Ann. § 50-4-21. Mr. Ndambi worked for CoreCivic while detained at Cibola from approximately June to October 2017.

11. Plaintiff Mbah Emmanuel Abi is an adult resident of Brunswick, Ohio. Mr. Abi has filed a consent to join this action. *See* Exh. 2.

12. Mr. Abi was an employee of CoreCivic, as that term is defined by the FLSA, 29 U.S.C. § 203(e)(1) and (g), and the NMMWA, NM Stat. Ann. § 50-4-21. Mr. Abi worked for CoreCivic while detained at Cibola from approximately June to November 2017.

13. Plaintiff Nkemtoh Moses Awombang is an adult resident of Cleveland, Ohio. Mr. Awombang has filed a consent to join this action. *See* Exh. 3.

14. Mr. Awombang was an employee of CoreCivic, as that term is defined by the FLSA, 29 U.S.C. § 203(e)(1) and (g), and the NMMWA, NM Stat. Ann. § 50-4-21. Mr. Awombang worked for CoreCivic while detained at Cibola from approximately June to December 2017.

Defendant

15. Defendant CoreCivic, Inc., ("CoreCivic" or "Defendant") formerly Corrections Corporation of America,[1] is a real estate investment trust. CoreCivic is organized under the laws

[1] In late 2016, the company announced it was changing its name to CoreCivic from Corrections Corporation of America. It did not otherwise change its legal identity. As a result, this complaint uses the names CoreCivic and Corrections Corporation of America interchangeably.

of Maryland with its principal place of business at 10 Burton Hills Boulevard, Nashville, Tennessee 37215. CoreCivic has a registered agent, The Corporation Trust, Inc., located at 2405 York Road, Suite 201 Lutherville Timonium, Maryland 21093.

16. At all relevant times, CoreCivic owned and operated the Cibola County Correctional Center ("Cibola") located at 2000 Cibola Loop, Milan, NM 87021, pursuant to the purported authority of a private service contract with Cibola County, New Mexico.

17. At all relevant times, Cibola County, New Mexico maintained an Intergovernmental Service Agreement ("IGSA") with U.S. Immigration and Customs Enforcement ("ICE") to detain immigrants on behalf of ICE.

FACTUAL ALLEGATIONS RELATED TO ALL CLAIMS

18. CoreCivic is the second-largest private prison and detention corporation in the United States, with a market capitalization of nearly $3 billion. It recently estimated that it owns 58% of all prison beds and manages 41% of all private prison beds in the United States. CoreCivic's contracts with ICE to civilly detain immigrants with pending removal proceedings currently account for at least 30% of its annual revenues.

19. CoreCivic owns and operates Cibola, which is a civil immigration detention center and prison complex. In 2016, Cibola County entered into an IGSA with ICE to maintain custody of civilly detained immigrants. Cibola County, in turn, entered into a service contract with CoreCivic in which CoreCivic agreed to serve as Cibola's independent contractor for the care and safety of civilly detained immigrants and to operate Cibola in compliance with the terms of the IGSA between ICE and Cibola County.

20. As an independent contractor and service provider to Cibola County, CoreCivic drafted and supplied Cibola's staffing plan in response to a Performance Work Statement issued

by ICE. CoreCivic determined the number, tasks, and pay rate of detained immigrants who would perform work.

21. Civilly detained immigrants are individuals held in civil detention while their immigration cases are processed. Such individuals are "administrative detainees," as they have not been charged with any criminal violation. The purpose of their detention is to ensure their presence during the administrative process and, if necessary, to ensure their availability for removal from the United States. While some civilly detained immigrants are removed from the United States after their detention, many such individuals are released from detention with permission to reside and work in the United States legally. Civil immigration detention is not punitive or corrective, it does not reflect a determination that detained immigrants have violated any laws of the United States, and it does not determine the outcome of their immigration cases. By law, civil detainees are the sole owners of the labor they provide.

22. Plaintiffs and those similarly situated are civilly detained immigrants previously or currently detained at Cibola.

23. Under the IGSA, Cibola County agreed to provide or procure services necessary to civilly detain immigrants. The ISGA incorporates into its terms the Service Contract Act, 41 U.S.C. § 351 *et seq.*, thereby requiring, *inter alia*, that any employees providing services under the contract must be paid the prevailing wages and benefits in the locality where they are providing such services. The IGSA requires Cibola County to provide or procure all services at Cibola in compliance with "all applicable federal, state, and local laws and standards." If a conflict exists between any of these laws, regulations, or standards, the IGSA provides that "the most stringent standard shall apply."

24. CoreCivic contracted with Cibola County to provide services necessary to civilly detain immigrants in compliance with the terms of the IGSA, and to hire and pay workers the prevailing wage in the community and in compliance with the state and federal minimum wage requirements. In contrast to its contract, CoreCivic has failed to provide the civilly detained immigrants with basic necessities. CoreCivic does not have the discretion to employ civilly detained immigrants to perform services necessary to operate Cibola and to pay them an amount less than the legally required wage for their work, which is sometimes as little as one dollar per day.

25. Cibola has the capacity to hold up to 1,116 civilly detained immigrants per day. The number of such immigrants in custody at Cibola at any given time from January 2017 to the present exceeded 100 persons and, at times, has exceeded 800 persons.

26. CoreCivic operates and maintains a work program at Cibola, pursuant to which it has suffered or permitted Plaintiffs and those similarly situated to perform work that benefits CoreCivic. Such work provides services necessary to keep Cibola operational, including preparing and serving meals, cleaning the facilities and performing other janitorial tasks, performing laundry services, and operating the library and the barber shop. These services benefit CoreCivic because they are integral to Cibola's operation and the company's profitable performance of its service contract with Cibola County. They are, therefore, essential to CoreCivic's fulfilment of its obligations under its contract with Cibola County.

27. Plaintiffs and those similarly situated were CoreCivic employees under the FLSA and the NMMWA. CoreCivic supplied daily supervision over civilly detained immigrants who participated in the work program, including, but not limited to, creating and continuously

revising a facility staffing plan that accounts for the positions, hours, and pay of all detained immigrants who participate.

28. CoreCivic paid the Plaintiffs and those similarly situated at a rate of pay that was less than the legally required wage and sometimes as little as one dollar per day. On some occasions, Plaintiffs and those similarly situated were not paid at all for their work. In all cases, Plaintiffs and those similarly situated were paid less than the minimum wage required by the FLSA and NMMWA and less than the prevailing wage for Cibola County.

29. In violation of the provisions of the IGSA, CoreCivic has failed to follow federal and state laws when compensating civilly detained immigrants for work they perform.

30. CoreCivic has failed to provide Plaintiffs and those similarly situated with adequate facilities and basic necessities, despite its use of their labor to maintain and operate Cibola. For example, CoreCivic often served insufficient amounts of food, at unsafe temperatures, and/or without hygienic food-handling safeguards. CoreCivic also failed to provide adequate access to telephones and legal materials.

31. Plaintiffs and those similarly situated used their wages to purchase items, such as phone calls, food, and toiletries, that met their basic needs. CoreCivic deducted the expense of such items from the accounts of Plaintiffs and those similarly situated.

32. CoreCivic failed to operate Cibola in compliance with the relevant contractual requirements. For instance, a January 2018 inspection by ICE's Office of Detention Oversight found the facility to be deficient in no fewer than 31 contractually imposed standards.

Plaintiff Desmond Ndambi

33. Mr. Ndambi was detained at Cibola from approximately June 22, 2017, to approximately October 1, 2017. He remained in civil immigration detention at Cibola while his immigration case was processed.

34. Shortly after arriving at Cibola, Mr. Ndambi began working as a janitor at the facility. He worked in this capacity for approximately one to three hours per day, seven days per week. CoreCivic knew that Mr. Ndambi was performing this work and permitted him to do so. Guards, who were CoreCivic employees, supervised his work, and CoreCivic provided the cleaning supplies and tools necessary for Mr. Ndambi to perform the work. CoreCivic benefitted from Mr. Ndambi's cleaning work because it was necessary to maintain the facility at a profit. CoreCivic paid Mr. Ndambi only one dollar per day for his cleaning work.

35. Around late July 2017, Mr. Ndambi was selected to work in Cibola's library.

36. For the last approximately two months of his detention, Mr. Ndambi worked in the library approximately eight hours per day, five days per week. CoreCivic controlled Mr. Ndambi's work hours through its staffing plan.

37. CoreCivic knew of Mr. Ndambi's library work and permitted it. A CoreCivic employee told him when to work and escorted him to and from his shift at the library. Another employee who lived in the community and was not confined in Cibola supervised Mr. Ndambi's work, assigned him tasks, and worked alongside him. Guards, who were CoreCivic employees, also supervised Mr. Ndambi's work. CoreCivic provided the library facility and tools necessary for Mr. Ndambi to perform the work.

38. CoreCivic usually paid Mr. Ndambi one dollar per day for his work in the library, without regard to the number of hours worked. Thus, for the approximately 40 hours per week

he worked in the library, CoreCivic paid Mr. Ndambi $0.125 per hour. On several occasions, however, CoreCivic failed to pay him at all for his work.

39. Mr. Ndambi's janitorial and library work benefitted CoreCivic by allowing it to conform to its service contract at the Cibola facility. Because it employed Mr. Ndambi, CoreCivic did not need to employ someone else (who would have been paid at rates compliant with the FLSA, the NMMWA, and the Service Contract Act) to perform the tasks that Mr. Ndambi performed.

40. Mr. Ndambi used his wages to purchase basic necessities while in detention. CoreCivic deducted the cost of such necessities from Mr. Ndambi's account. When he was released, CoreCivic paid Mr. Ndambi the funds remaining in his account.

Plaintiff Mbah Emmanuel Abi

41. Mr. Abi was detained at Cibola beginning approximately June 24, 2017, to approximately November 22, 2017. He remained in civil immigration detention at Cibola while his immigration case was processed.

42. Mr. Abi began working as a janitor at Cibola beginning in July 2017. He performed tasks such as cleaning the floors and toilets at the facility. Mr. Abi worked in the position approximately two hours per day, seven days per week. CoreCivic knew of Mr. Abi's work as a janitor and permitted it. He filled out a time sheet provided by CoreCivic that indicated how many hours he worked. Guards, who were CoreCivic employees, supervised his work, and CoreCivic provided the cleaning supplies and tools necessary for Mr. Abi to perform his work. Mr. Abi performed work that benefitted CoreCivic because it was necessary to maintain the facility at a profit. CoreCivic paid Mr. Abi one dollar per day for his janitorial work.

43. In August 2017, Mr. Abi filled out an application to begin working in the kitchen at Cibola. CoreCivic hired him and, through its staffing plan, assigned him to work at least six hours per day, at least five days per week. Mr. Abi signed a time sheet indicating how many hours he worked.

44. Mr. Abi prepared and served meals to civilly detained immigrants like himself and CoreCivic employees.

45. CoreCivic knew of Mr. Abi's work in the kitchen and permitted it. Guards, who were CoreCivic employees, supervised Mr. Abi's work. Further, CoreCivic provided the tools and facilities necessary for Mr. Abi to perform his work.

46. Mr. Abi's work benefitted CoreCivic because it was necessary to keep the facility operational and profitable, as CoreCivic did not employ or subcontract enough people who were not detained to run the kitchen without them. Because it employed Mr. Abi, CoreCivic did not need to employ someone else (who would have been paid at rates compliant with the FLSA, the NMMWA, and the Service Contract Act) to perform the tasks that Mr. Abi performed.

47. CoreCivic paid Mr. Abi $15 per week for working in the kitchen, without regard to the number of hours worked. Because he worked at least six hours per day, at least five days per week, CoreCivic paid Mr. Abi $0.50 or less per hour.

48. Mr. Abi used his wages to purchase basic necessities while in detention. CoreCivic deducted the cost of such necessities from Mr. Abi's account. When he was released, CoreCivic paid Mr. Abi funds remaining in his account.

Plaintiff Nkemtoh Moses Awombang

49. Mr. Awombang was detained at Cibola beginning approximately June 20, 2017, until approximately December 20, 2017. He remained in civil immigration detention at Cibola while his immigration case was processed.

50. Shortly after arriving at Cibola, Mr. Awombang began working as a janitor at the facility. In this position, Mr. Awombang worked approximately seven days per week, several hours per day. CoreCivic knew that Mr. Awombang was performing this work and permitted him to do so. Guards, who were CoreCivic employees, supervised his work, and CoreCivic provided the cleaning supplies and tools necessary to perform the work. CoreCivic benefitted from Mr. Awombang's cleaning work because it was necessary to maintain the facility at a profit. CoreCivic paid Mr. Awombang only one dollar per day for his cleaning work.

51. After approximately two months, Mr. Awombang began working in the kitchen, where he worked approximately five and a half to six hours per day, five days per week. CoreCivic controlled Mr. Awombang's work hours through its staffing plan. Mr. Awombang worked alongside people who were not detained. He worked in this position for approximately four months.

52. CoreCivic knew that Mr. Awombang worked in the kitchen and permitted him to do so. Guards, who were CoreCivic employees, supervised Mr. Awombang's work. Further, CoreCivic provided the facilities and tools necessary for Mr. Awombang to perform his work. CoreCivic benefitted from Mr. Awombang's kitchen work because it was necessary to keep the facility operational at a profit, as CoreCivic did not employ or subcontract enough people who were not detained to run the kitchen without them. Because it employed Mr. Awombang, CoreCivic did not need to employ someone else (who would have been paid at rates compliant

with the FLSA, the NMMWA, and the Service Contract Act) to perform the tasks that Mr. Awombang performed.

53. CoreCivic paid Mr. Awombang $15 per week without regard to the number of hours he worked.

54. Mr. Awombang used his wages to purchase basic necessities while in detention. CoreCivic deducted the cost of such necessities from Mr. Awombang's account. When he was released, CoreCivic paid Mr. Awombang funds remaining in his account.

FLSA COLLECTIVE ACTION ALLEGATIONS

55. CoreCivic failed to pay the Plaintiffs and all others similarly situated the minimum wages required by the FLSA, 29 U.S.C. §§ 201, *et seq*.

56. CoreCivic failed to pay the Plaintiffs and all others similarly situated for all hours worked and failed to pay an effective hourly rate at or above the federal minimum wage rate of $7.25 per hour through its practices of paying a flat rate that was less than the legally required wage for their work, and sometimes as little as one dollar per day.

57. This action can, and should, be maintained as a collective action pursuant to 29 U.S.C. § 216(b) for all claims to unpaid or underpaid wages and liquidated damages that can be redressed under the FLSA.

58. Plaintiffs seek certification of these claims as a collective action on behalf of all civilly detained immigrants who performed work for CoreCivic at Cibola through its work program at any time during the period beginning two years prior to the date on which this action is filed and continuing to the date on which notice is issued of the opportunity to join this action.

59. Plaintiffs reserve the right to revise the definition of the class based upon information learned after the filing of this action.

60. Upon information and belief, there are hundreds of similarly situated current and former civilly detained immigrants at Cibola who have been subjected to the same unlawful conduct that the Plaintiffs challenge herein.

61. Members of the proposed collective action are similarly situated. CoreCivic civilly detained such members in the same facility, Cibola. CoreCivic permitted such members to work, and such members did work, for the benefit of CoreCivic but were compensated at rates below the FLSA-mandated minimum wage.

62. Members of the proposed collective action have been subjected to the same or substantially the same pay policies and practices.

63. Members of the proposed collective action have been subjected to the same or substantially the same policy or practice that required or permitted them to perform work for CoreCivic's benefit, but compensated them at rates below the FLSA-mandated minimum wage.

64. The identities of the members of the proposed collective action are known to CoreCivic and can be located through CoreCivic's records.

65. Members of the proposed collective action would benefit from the issuance of Court-supervised Notice and the opportunity to join this lawsuit.

66. A collective action will provide the most efficient mechanism for adjudicating the claims of Plaintiffs and members of the proposed collective action.

67. Therefore, Plaintiffs request that they be permitted to serve as representatives of those who consent to participate in this action and that the action be granted collective action status pursuant to 29 U.S.C. § 216(b).

RULE 23 NEW MEXICO MINIMUM WAGE ACT CLASS ACTION ALLEGATIONS

68. Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs bring class-action claims for unpaid or underpaid wages under the NMMWA, NM Stat. Ann. §§ 50-4-21, *et seq*.

69. Plaintiffs bring these class-action claims on behalf of themselves and all other civilly detained immigrants who performed work for CoreCivic at Cibola in its work program at any time from two years prior to the filing of this action through the date on which notice is issued affording the right to opt out of any class certified pursuant to Rule 23(b)(3) ("New Mexico Minimum Wage Act Class").

70. Plaintiffs reserve the right to revise the definition of the class based upon information learned after the filing of this action.

71. Plaintiffs bring these claims on behalf of themselves and members of the New Mexico Minimum Wage Act Class under Federal Rules of Civil Procedure 23(a), (b)(2) for their requests for declaratory and injunctive relief only, and (b)(3) for their requests for damages. The proposed New Mexico Minimum Wage Act Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those rules.

72. **Numerosity:** The proposed class is so numerous that the joinder of all such persons is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. The exact number of class members is unknown to Plaintiffs at this time, because it is within CoreCivic's control. However, upon information and belief, the class comprises hundreds of members. Membership in the class is ascertainable from CoreCivic's detention and employment records.

73. **Commonality**: Plaintiffs and all members of the New Mexico Minimum Wage Act Class have been compensated using the unlawful practices alleged herein and, therefore, one

or more questions of law or fact are common to the New Mexico Minimum Wage Act Class. These common questions include, but are not limited to, the following:

a. Whether CoreCivic is an employer of Plaintiffs and members of the New Mexico Minimum Wage Act Class within the meaning of the NMMWA;

b. Whether Plaintiffs and members of the New Mexico Minimum Wage Act Class are employees within the meaning of the NMMWA;

c. Whether CoreCivic engaged, suffered, or permitted Plaintiffs and members of the New Mexico Minimum Wage Act Class to work on its behalf;

d. Whether the minimum wage in the NMMWA applies to Plaintiffs and members of the New Mexico Minimum Wage Act Class;

e. Whether CoreCivic failed or refused to pay Plaintiffs and members of the New Mexico Minimum Wage Act Class the minimum wage required by the NMMWA;

74. **Typicality**: Plaintiffs and members of the New Mexico Minimum Wage Act Class were subjected to the same unlawful policies, practices, and procedures and sustained similar losses, injuries, and damages. All class members were subjected to the same compensation practices by CoreCivic, as alleged herein, that required or permitted them to perform work for CoreCivic's benefit, but compensated them at rates below the NMMWA-mandated minimum wage. Plaintiffs' claims are therefore typical of the claims that could be brought by any member of the New Mexico Minimum Wage Act Class, and the relief sought is typical of the relief that could be sought by each member of the New Mexico Minimum Wage Act Class in separate actions.

75. **Adequacy of Representation**: Plaintiffs are able to fairly and adequately protect the interests of all members of the Class, as they are challenging the same practices as the class

as a whole, and there are no known conflicts of interest between Plaintiffs and the members of the New Mexico Minimum Wage Act Class. Plaintiffs have retained counsel who have extensive experience with the prosecution of wage-and-hour claims and complex class-action litigation.

76. **Predominance and Superiority**: The common questions identified above predominate over any individual issues. A class action is superior to other available means for the fair and efficient adjudication of this controversy.

77. Pursuit of this action as a class would provide the most efficient mechanism for adjudicating the claims of Plaintiffs and the members of the New Mexico Minimum Wage Act Class.

RULE 23 NEW MEXICO UNJUST ENRICHMENT CLASS ACTION ALLEGATIONS

78. Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs bring class-action claims for unjust enrichment under New Mexico common law.

79. Plaintiffs bring these class-action claims on behalf of themselves and all other civilly detained immigrants who performed work for CoreCivic at Cibola in its work program four years prior to the filing of this action through the date on which notice is issued affording the right to opt out of any class certified pursuant to Rule 23(b)(3) ("Unjust Enrichment Class").

80. Plaintiffs performed all work during the class period in the absence of an enforceable employment contract with CoreCivic.

81. Plaintiffs reserve the right to revise the definition of the classes based upon information learned after the filing of this action.

82. Plaintiffs bring these claims on behalf of themselves and members of the Unjust Enrichment Class under Federal Rules of Civil Procedure 23(a), (b)(2) for their requests for

declaratory and injunctive relief only, and (b)(3) for their requests for damages. The proposed Unjust Enrichment Class satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of those rules.

83. **Numerosity:** The proposed class is so numerous that the joinder of all such persons is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. The exact number of class members is unknown to Plaintiffs at this time, because it is within CoreCivic's control. However, upon information and belief, the class comprises hundreds of members. Membership in the class is ascertainable from CoreCivic's detention and employment records.

84. **Commonality**: Plaintiffs and all members of the Unjust Enrichment Class have been compensated using the unlawful practices alleged herein and, therefore, one or more questions of law or fact are common to the Unjust Enrichment Class. These common questions include, but are not limited to, the following:

a. Whether CoreCivic knowingly benefitted from the labor of Plaintiffs and members of the Unjust Enrichment Class;

b. Whether CoreCivic failed to pay fair and adequate compensation to Plaintiffs and members of the Unjust Enrichment Class;

c. Whether it would be unjust for CoreCivic to retain the benefit from any failure to pay fair and adequate compensation to Plaintiffs and members of the Unjust Enrichment Class;

85. **Typicality**: Plaintiffs and members of the Unjust Enrichment Class were subjected to the same unlawful policies, practices, and procedures and sustained similar losses, injuries, and damages. All class members were subjected to the same compensation practices by

CoreCivic, as alleged herein, that required or permitted them to perform work for CoreCivic's benefit, but denied them fair and adequate compensation, including FLSA-mandated and NMMWA-mandated minimum wages and the prevailing wage in Cibola's locality. Plaintiffs' claims are therefore typical of the claims that could be brought by any member of the Unjust Enrichment Class, and the relief sought is typical of the relief that could be sought by each member of the Unjust Enrichment Class in separate actions.

86. **Adequacy of Representation**: Plaintiffs are able to fairly and adequately protect the interests of all members of the Unjust Enrichment Class, as they are challenging the same practices as the class as a whole, and there are no known conflicts of interest between Plaintiffs and the members of the Unjust Enrichment Class. Plaintiffs have retained counsel who have extensive experience with the prosecution of wage-and-hour claims and complex class-action litigation.

87. **Predominance and Superiority**: The common questions identified above predominate over any individual issues. A class action is superior to other available means for the fair and efficient adjudication of this controversy.

88. Pursuit of this action as a class would provide the most efficient mechanism for adjudicating the claims of Plaintiffs and the members of the Unjust Enrichment Class.

CAUSES OF ACTION

COUNT I
FAIR LABOR STANDARDS ACT OF 1938
29 U.S.C. §§ 201, *et seq.*

89. Plaintiffs reallege and incorporate by reference all previous allegations of the complaint.

90. Plaintiffs and the proposed class members are employees within the meaning of 29 U.S.C. §§ 203(e)(1) and (g);

91. Defendant is an employer within the meaning of 29 U.S.C. § 203(d);

92. Defendant has employed and continues to employ Plaintiffs and the proposed class members by engaging, suffering, and/or permitting them to work on its behalf.

93. Plaintiffs and the proposed class members have performed and continue to perform work necessary to keep the facility operational, including preparing and serving meals, cleaning the facilities and performing other janitorial tasks, performing laundry services, and operating the library and the barber shop.

94. Since July 24, 2009, the Fair Labor Standards Act has required an employer to pay an employee a minimum wage rate of seven dollars and twenty-five cents ($7.25) per hour. 29 U.S.C. § 206.

95. Defendant has paid and continues to pay Plaintiffs and the proposed class members less than the legally required wage for their work, and sometimes as little as one dollar per day.

96. Defendant has violated and continues to violate 29 U.S.C. § 206 by paying Plaintiffs and the proposed class members less than $7.25 per hour.

COUNT II
NEW MEXICO MINIMUM WAGE ACT
NM Stat. Ann. §§ 5-4-19, *et seq.*

97. Plaintiffs reallege and incorporate by reference all previous allegations of the complaint.

98. Plaintiffs and the proposed class members are employees within the meaning of NM Stat. Ann. § 50-4-21.C.;

99. Defendant is an employer within the meaning of NM Stat. Ann. § 50-4-21.B;

100. Defendant has employed and continues to employ Plaintiffs and the proposed class members by engaging, suffering, and/or permitting them to work on its behalf.

101. Plaintiffs and the proposed class members have performed and continue to perform work necessary to keep the facility operational, including preparing and serving meals and other tasks in the kitchen, cleaning the facilities and performing other janitorial tasks, performing laundry services, and operating the library and the barber shop.

102. Since January 1, 2009, the New Mexico Minimum Wage Act has required an employer to pay an employee a minimum wage rate of seven dollars and fifty cents ($7.50) per hour. NM Stat. Ann. § 50-4-22.A.

103. Defendant has paid and continues to pay Plaintiffs and the proposed class members less than the legally required wage for their work, and sometimes as little as one dollar per day.

104. Defendant has violated and continues to violate NM Stat. Ann. § 50-4-22.A. by paying Plaintiffs and the proposed class members less than $7.50 per hour.

COUNT III
UNJUST ENRICHMENT
New Mexico Common Law

105. Plaintiffs reallege and incorporate by reference all previous allegations of the complaint.

106. Defendant has operated and continues to operate Cibola as a for-profit business.

107. Defendant has utilized and continues to utilize Plaintiffs' and the proposed class members' labor to operate Cibola. Defendant has paid and continues to pay Plaintiffs and the

proposed class members less than the prevailing wage in Cibola's locality for their work, and sometimes as little as one dollar per day.

108. Defendant has not paid, and continues not to pay, Plaintiffs and the proposed class members adequate compensation for their work at Cibola.

109. Defendant has knowingly benefitted, and continues knowingly to benefit, at the expense of Plaintiffs and the proposed class members, retaining the difference between the rate it has paid, and continues to pay, Plaintiffs and the proposed class members and the fair and adequate compensation that it should have paid, and should pay, Plaintiffs and the proposed class members for their work at Cibola.

110. It is and would be unjust for defendant to retain the benefit gained from its practice of failing to pay fair and adequate compensation to Plaintiffs and the proposed class members for their work at Cibola.

PRAYER FOR RELIEF

Wherefore, plaintiffs pray that the Court:

A. Certify this case as a class action on behalf of the classes defined above;

B. Find that Plaintiffs are proper representatives of the Classes;

C. Appoint the undersigned as Class Counsel;

D. Order Defendant to pay for all necessary notices to the Classes;

E. Declare that plaintiffs and members of the Classes are employees within the meaning of 29 U.S.C. § 203(e) and NM Stat. Ann. § 50-4-21.C;

F. Declare that Defendant is an employer within the meaning of 29 U.S.C. § 203(d) and NM Stat. Ann. § 50-4-21.B.;

G. Declare that Defendant has violated 29 U.S.C. § 206 and NM Stat. Ann. § 50-4-22.A.;

H. Order Defendant to post at Cibola and at its principal place of business a notice describing its violations of the New Mexico Minimum Wage Act pursuant to NM Stat. Ann. § 50-4-25.F.;

I. Enjoin Defendant from paying civilly detained immigrants less than the minimum wage required by 29 U.S.C. § 206 and NM Stat. Ann. § 50-4-22.A for work performed at Cibola;

J. Award plaintiffs and members of the Classes their unpaid or underpaid wages and an additional equal amount as liquidated damages pursuant to 29 U.S.C. § 216;

K. Award plaintiffs and members of the Classes their unpaid or underpaid wages plus interest, and an additional amount equal to twice the unpaid or underpaid wages, pursuant to the New Mexico Minimum Wage Act, NM Stat. Ann. § 50-4-26.C;

L. Award plaintiffs their reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216 and NM Stat. Ann. § 50-4-26.E, or as otherwise authorized by law;

M. Declare that Defendant has been unjustly enriched by failing to adequately and fairly pay plaintiffs and members of the Classes for their work at Cibola;

N. Award plaintiffs and members of the Classes their unpaid or underpaid wages for their work at Cibola using the prevailing wage rates required by the contract between CoreCivic and Cibola County for the work they performed;

O. Award plaintiffs and class members prejudgment interest pursuant to NM Stat. Ann. § 56-8-3(B) or to the extent otherwise authorized by law;

P. Award plaintiffs and members of the Classes post-judgment interest to the extent authorized by law; and

Q. Award plaintiffs and members of the Classes such additional relief as the interests of justice may require.

DATED this 14th day of November, 2018.

Respectfully submitted,

/s/ Joseph M. Sellers
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*pro hac vice application forthcoming

Attorneys for Plaintiffs and the Proposed Class

Exhibit 1

NDAMBI, ET AL. V. CORECIVIC, INC.

CONSENT TO JOIN LAWSUIT CLAIMING THAT CIVIL IMMIGRATION DETAINEES AT THE CIBOLA COUNTY CORRECTIONAL CENTER WERE PAID LESS THAN THE AMOUNT REQUIRED BY LAW FOR THEIR WORK

Name: Desmond Ndambi

1. I am over the age of eighteen and competent to give my consent in this matter.

2. I performed work for CoreCivic, Inc. while detained at Cibola County Correctional Center at some point during the last three years.

3. I consent and agree to join this case against CoreCivic, Inc., to recover unpaid minimum wages and other benefits, including liquidated damages. By joining this law suit, I agree to be bound by any ruling or judgment issued by the Court or by any settlement of this case.

4. I understand that this lawsuit claims that CoreCivic, Inc. failed to pay me and others detained at the Cibola Correctional Center wages at amounts required by law for work. I understand that this lawsuit seeks to recover unpaid wages and other compensation that CoreCivic, Inc. unlawfully retained.

5. I choose to be represented by class counsel Cohen Milstein Sellers & Toll PLLC; Miner, Barnhill & Galland, P.C; the Law Office of R. Andrew Free; and any other lawyers they may choose to associate with for all purposes in this action and to take any steps necessary to pursue my claims.

6. I understand that I may withdraw this consent at any time by notifying in writing class counsel identified above.

09/24/2018
Date Signed

Signature

Desmond Ndambi
Printed Name

Exhibit 2

NDAMBI, ET AL. V. CORECIVIC, INC.

CONSENT TO JOIN LAWSUIT CLAIMING THAT CIVIL IMMIGRATION DETAINEES AT THE CIBOLA COUNTY CORRECTIONAL CENTER WERE PAID LESS THAN THE AMOUNT REQUIRED BY LAW FOR THEIR WORK

Name: Mbah Emmanuel Abi

1. I am over the age of eighteen and competent to give my consent in this matter.

2. I performed work for CoreCivic, Inc. while detained at Cibola County Correctional Center at some point during the last three years.

3. I consent and agree to join this case against CoreCivic, Inc., to recover unpaid minimum wages and other benefits, including liquidated damages. By joining this law suit, I agree to be bound by any ruling or judgment issued by the Court or by any settlement of this case.

4. I understand that this lawsuit claims that CoreCivic, Inc. failed to pay me and others detained at the Cibola Correctional Center wages at amounts required by law for work. I understand that this lawsuit seeks to recover unpaid wages and other compensation that CoreCivic, Inc. unlawfully retained.

5. I choose to be represented by class counsel Cohen Milstein Sellers & Toll PLLC; Miner, Barnhill & Galland, P.C; the Law Office of R. Andrew Free; and any other lawyers they may choose to associate with for all purposes in this action and to take any steps necessary to pursue my claims.

6. I understand that I may withdraw this consent at any time by notifying in writing class counsel identified above.

10/31/18
Date Signed

Signature

Mbah Emmanuel Abi
Printed Name

Exhibit 3

NDAMBI, ET AL. V. CORECIVIC, INC.

CONSENT TO JOIN LAWSUIT CLAIMING THAT CIVIL IMMIGRATION DETAINEES AT THE CIBOLA COUNTY CORRECTIONAL CENTER WERE PAID LESS THAN THE AMOUNT REQUIRED BY LAW FOR THEIR WORK

Name: Nkemtoh moses Nwombang

1. I am over the age of eighteen and competent to give my consent in this matter.

2. I performed work for CoreCivic, Inc. while detained at Cibola County Correctional Center at some point during the last three years.

3. I consent and agree to join this case against CoreCivic, Inc., to recover unpaid minimum wages and other benefits, including liquidated damages. By joining this law suit, I agree to be bound by any ruling or judgment issued by the Court or by any settlement of this case.

4. I understand that this lawsuit claims that CoreCivic, Inc. failed to pay me and others detained at the Cibola Correctional Center wages at amounts required by law for work. I understand that this lawsuit seeks to recover unpaid wages and other compensation that CoreCivic, Inc. unlawfully retained.

5. I choose to be represented by class counsel Cohen Milstein Sellers & Toll PLLC; Miner, Barnhill & Galland, P.C; the Law Office of R. Andrew Free; and any other lawyers they may choose to associate with for all purposes in this action and to take any steps necessary to pursue my claims.

6. I understand that I may withdraw this consent at any time by notifying in writing class counsel identified above.

10/19/18
Date Signed

Signature

Nkemtoh moses Nwombang
Printed Name

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

Desmond Ndambi, et al., individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 1:18-cv-03521-RDB
v.	)	
CoreCivic, Inc.,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant CoreCivic, Inc., moves to dismiss the Complaint, pursuant to Civil Rule of Procedure 12(b), because it fails to state a claim upon which relief can be granted. Plaintiffs—former immigration detainees in federal custody—base their claims on the incorrect legal premise that they were entitled to federal and state minimum wages for their voluntary participation in a work program sponsored by the detention facility. For the reasons set forth in the Memorandum, the minimum-wage laws do not apply to labor performed by immigration detainees because of the economic reality of their custodial detention. And because they do not apply, Plaintiffs have no claim for unjust enrichment either. The Complaint should be dismissed with prejudice.

Dated: January 11, 2019

Respectfully submitted,

/s/ Daniel P. Struck

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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3526357.1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

Desmond Ndambi, et al., individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 1:18-cv-03521-RDB
v.	)	
CoreCivic, Inc.,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant CoreCivic, Inc., moves to dismiss this action pursuant to Civil Procedure Rule 12(b). Plaintiffs and the putative class members—all former or current civil immigration detainees in the custody of U.S. Immigration and Customs Enforcement ("ICE")—bring claims under the Fair Labor Standards Act ("FLSA") and the New Mexico Minimum Wage Act ("NMMWA"). They allege that they were underpaid for labor voluntarily performed while detained in a New Mexico facility and awaiting removal proceedings. Their claims, however, rely on the incorrect legal premise that they were "employees" of the detention facility's private operator, CoreCivic. As courts across the country have consistently concluded, they were not employees because the economic reality of their custodial detention belies any indicia of a traditional free-market-employment relationship. Thus, as a matter of law, neither the FLSA nor the NMMWA apply. And because they were not entitled to federal or state statutory wages, their claim for unjust enrichment fails as well. The Court should dismiss all claims with prejudice.

I. COMPLAINT ALLEGATIONS.[1]

Plaintiffs Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses are three former ICE detainees who were detained at the Cibola County Correctional Center ("Cibola") in Cibola County, New Mexico pending their removal proceedings. (Doc. 1, ¶¶ 9–14 & 21.) CoreCivic owns and operates Cibola pursuant to an Intergovernmental Service Agreement ("IGSA") between ICE and Cibola County. (Id., ¶¶ 15–17, 21, 23 & 24.) Under that agreement, CoreCivic is required to maintain a voluntary work program for ICE detainees. (Id., ¶ 26.)

Ndambi alleges that he was detained at Cibola from June 22, 2017, to October 1, 2017, and worked as a janitor and in the facility's library. (Id., ¶¶ 33-38.) He alleges that he was paid $1 for each day that he worked. (Id.) Abi alleges that he was detained at Cibola from June 24, 2017, to November 22, 2017, and worked as a janitor and in the facility's kitchen. (Id., ¶¶ 41-47.) He alleges that he was paid $1 per day as a janitor and $15 per week as a kitchen worker. (Id.) Awombang alleges that he was detained at Cibola from June 20, 2017, to December 20, 2017, and also worked as a janitor and kitchen worker for the same amounts. (Id. ¶¶ 49-53.)

In Count I, Plaintiffs bring a claim under the FLSA and allege that they were entitled to the federal minimum wage of $7.25 per hour. (Id., ¶¶ 89–96.) They allege that CoreCivic was an employer under 29 U.S.C. § 203(d), and that they were employees under 29 U.S.C. §§ 203(e)(1) and (g). (Id.) In Count II, Plaintiffs bring a claim under the NMMWA and allege that they were entitled to the state minimum wage of $7.50 per hour. (Id., ¶¶ 99–104.) They allege that CoreCivic was an employer under N.M. Stat. § 50-4-21. (Id.) Finally, in Count III,

[1] For purposes of this Motion, the Court must assume the allegations in the Complaint are true and construe them in the light most favorable to Plaintiffs. *See In re Human Genome Scis. Inc. Sec. Litig.*, 933 F. Supp. 2d 751, 757 (D. Md. 2013).

Plaintiffs bring a New Mexico unjust-enrichment claim, alleging that their labor relieved CoreCivic from having to employ others the minimum wages. (Id., ¶¶ 46, 56, 57, 105–110.) Plaintiffs seek to certify their FLSA claim as a collective action, pursuant to 29 U.S.C. § 216(b), and their NMMWA and unjust enrichment claims as class actions, pursuant to Civil Rule 23, on behalf of all civilly detained immigrants who performed work at Cibola in the two (or four) years prior to the complaint and prospectively. (Id., ¶¶ 55-88.)

II. THE COMPLAINT FAILS TO STATE A VIABLE CLAIM.

A. Standard of Review.

To survive a motion to dismiss, a plaintiff must state a plausible claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* Although a court must accept as true all factual allegations, that principle "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Thus, the Court cannot accept as true Plaintiffs' allegations that they were "employees," or that CoreCivic was their "employer," under the minimum wage laws. Those are legal conclusions that this Court must decide as a matter of law.

B. Plaintiffs' FLSA Claim Should Be Dismissed.

Congress enacted the FLSA "to protect the standard of living and general well-being of the American worker." *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997); *see also* 29 U.S.C.A. § 202(a). The FLSA "mandates that employers pay a minimum wage to *covered* employees . . . ." *Ross v. Wolf Fire Prot., Inc.*, 799 F. Supp. 2d 518, 523 (D. Md. 2011) (citing 29 U.S.C. §§ 206(a)(1)) (emphasis added). But not everyone who meets the technical definition of an employee is covered under the FLSA. *See Benshoff v. City of Virginia Beach*, 180 F.3d

136, 140 (4th Cir. 1999) (holding that "the definitions of 'employ' and 'employer' were 'not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another,' nor should they be interpreted so as to 'sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit") (alteration in original); *see also Francis v. Johns*, No. 5:11-CT-3005-FL, 2013 WL 1309285, at *7 (E.D. N.C. Mar. 28, 2013) (holding that "the FLSA's minimum wage provisions apply only to workers who are 'employees' within the meaning of the [FLSA]").

In determining whether a claimant is a covered employee within the meaning of the FLSA, the Supreme Court has instructed courts to look at "the 'economic reality' rather than 'technical concepts.'" *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961). That determination "does not depend on 'isolated factors but rather upon the circumstances of the whole activity.'" *Gionfriddo v. Jason Zink, LLC*, 769 F. Supp. 2d 880, 890 (D. Md. 2011) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)). "Courts generally look at the 'economic reality' of an individual's status in the workplace before determining liability." *Id.* "Those seeking compensation under the [FLSA] bear the initial burden of proving that an employer-employee relationship exists and that the activities in question constitute employment for purposes of the [FLSA]." *Benshoff*, 180 F.3d at 140.

In a custodial-detention setting such as this, the question whether an employment relationship exists turns on the economic reality of the relationship: Can it plausibly be said that the claimant is "'employed' in the relevant sense at all?" *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).

In the prison context, federal courts have uniformly answered that question in the negative, holding that the custodial nature of prisoner labor falls outside the type of employment relationship that Congress intended the FLSA to protect. *See Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) ("We join these other circuits and hold that a prisoner doing work in or for the prison is not an 'employee' under the FLSA and is thus not entitled to the federal minimum wage."); *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005) ("The Fair Labor Standards Act is intended for the protection of employees, and prisoners are not employees of their prison, whether it is a public or a private one. So they are not protected by the Act."); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir. 1999) ("Each circuit that has addressed the question has concluded that prisoners producing goods and services used by the prison should not be considered employees under the FLSA."); *Gambetta v. Prison Rehab. Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1124 (11th Cir. 1997) ("We are persuaded by the reasoning of our sister circuits, and we join them in the conclusion that inmates who work for state prison industries are not covered by the FLSA."); *Danneskjold v. Hausrath*, 82 F.3d 37, 43–44 (2d Cir. 1996) (holding: "[N]o Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wages. Prisoners may thus be ordered to cook, staff the library, perform janitorial services, work in the laundry, or carry our numerous other tasks that serve various institutional missions of the prison, such as recreation, care and maintenance of the facility, or rehabilitation. Such work occupies the prisoners' time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their incarceration."; further holding "that prison labor that produces goods or services for institutional needs of the prison, whether voluntary or involuntary, inside or outside the institution, or in

connection with a private employer, is not an employment relationship within the meaning of the FLSA"); *Abdullah v. Myers*, 52 F.3d 324, *1 (6th Cir. 1995) (unpublished op.) ("Other circuits which have addressed this issue have concluded that prisoners are not employees entitled to the minimum wage because the prison has a rehabilitative rather than a pecuniary interest in encouraging inmates to work, because the relationship is not an employment relationship but a custodial one, and because the purposes of the Fair Labor Standards Act are not implicated in this situation, as the prisoner does not require the minimum wage to maintain his standard of living, which is provided by the state, and there is no unfair competition with employers outside the prison."); *Franks v. Oklahoma State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993) ("In our view, the economic reality test was not intended to apply to work performed in the prison by a prison inmate."); *see also Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (holding prisoner not employee of the prison); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994) (same); *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) ("[W]e are influenced by the fact that no other circuit has construed the relationship between a prison and a prisoner with a hard-time obligation who works on a program structured by the prison as an employment relationship within the FLSA.").

In *Harker v. State Use Industries*, 990 F.2d 131, 136 (4th Cir. 1993), the Fourth Circuit agreed, noting that federal courts have uniformly held that the FLSA does not cover prisoner labor "for any type of prison-operated industry or for the prison itself." It reasoned that the custodial relationship differs significantly from the traditional-free market employment relationship that Congress intended to protect:

> [Prisoners] certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day. [The parties] do not enjoy the employer-employee

> relationship contemplated in the [FLSA], but instead have a custodial relationship to which the Act's mandates do not apply.
>
> Further, the FLSA does not cover these inmates because the statute itself states that Congress passed minimum wage standards in order to maintain a "standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). While incarcerated, inmates have no such needs because the DOC provides them with the food, shelter, and clothing that employees would have to purchase in a true employment situation. So long as the DOC provides for these needs, Harker can have no credible claim that inmates need a minimum wage to ensure their welfare and standard of living.

Id. at 133. These reasons preclude prisoner-labor-based claims under the FLSA regardless of whether the alleged employer was a private or government entity, or whether the work assignment was voluntary or involuntary. *Id.* at 133, 136; *accord Danneskjold*, 82 F.3d at 43 (holding that "the voluntary performance of labor that serves institutional needs of the prison is not in economic reality an employment relationship. The prisoner is still a prisoner; the labor does not undermine FLSA wage structures; the opportunity is open only to prisoners; and the prison could order the labor if it chose. Indeed, to hold otherwise would lead to a perverse incentive on the part of prison officials to order the performance of labor instead of giving some choice to inmates").

The Fourth Circuit has thus *categorically* rejected FLSA claims based on all types of prisoner labor because applying a control-type test "in situations when an inmate works inside prison walls only encourages unnecessary litigation and invites confusion in an area of the law that should be quite clear." *Harker*, 990 F.2d at 136. It stated it "will not judicially impose a new kind of employer-employee framework upon the DOC and its inmates under the guise of interpreting the FLSA's scope," because, "[f]or more than fifty years, Congress has operated on

the assumption that the FLSA does not apply to prisoner labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts." *Id.*[2]

Courts have since extended this rationale to reject FLSA claims brought by pretrial detainees based on work-program labor, finding that the economic reality of pretrial detention was not materially different than that of incarcerated prisoners. *See Villarreal*, 113 F.3d at 206 (finding "inmate cases helpful because pretrial detainees are similar to convicted prisoners in that they are incarcerated and are under the supervision and control of a governmental entity, and holding: "Clearly, pretrial detainees are in a custodial relationship like convicted prisoners. Correctional facilities provide pretrial detainees with their everyday needs such as food, shelter, and clothing. Convicted prisoners are likewise provided these same basic needs. Additionally, like convicted prisoners, pretrial detainees suffer from loss of freedom of choice and privacy due to the nature of their confinement. In light of these similarities, we deem persuasive the cases addressing the applicability of the FLSA to convicted inmates.") (internal citation omitted).

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[2] The Fourth Circuit's refusal to interpret the FLSA in a manner that would extend its protections to cover custodial contexts because Congress never contemplated it when passing the Act is consistent with the Supreme Court's refusal to literally read statutes out of context to cover conduct that Congress never intended the statutes to address. *See, e.g., Yates v. United States*, 135 S. Ct. 1074, 1081, 1087 (2015) (rejecting "an aggressive interpretation of 'tangible object'" out of context to criminalize a defendant's destruction of fish, finding it "highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping"); *see also, e.g., Bond v. United States*, 572 U.S. 844, 857 (2014) ("Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions," and holding that it did not intend the Chemical Weapons Convention Implementation Act to cover the use of a toxic chemical by a jilted wife to assault her husband's paramour). Indeed, the Supreme Court's holding that "the 'economic reality' rather than 'technical concepts' is to be the test of employment," *Goldberg*, 366 U.S. at 33, echoes this instruction by the Supreme Court that context matters in determining whether a particular employment relationship is covered under the FLSA.

This is because pretrial-detention labor, like prisoner labor, bears none of the indicia of traditional free market employment, and imposing minimum wages in a custodial-detention setting is inconsistent with the FLSA's primary goal of protecting the standard of living and well-being of workers:

> Focusing on the economic reality of the situation in its entirety, we conclude that [a pretrial detainee] is not an "employee" under the FLSA. The purpose of the FLSA is to protect the standard of living and general well-being of the American worker. Because the correctional facility meets Villarreal's needs, his "standard of living" is protected. In sum, "the more indicia of traditional, free-market employment the relationship between the prisoner and his putative 'employer' bears, the more likely it is that the FLSA will govern the employment relationship." Villarreal's situation does not bear any indicia of traditional free-market employment contemplated under the FLSA. Accordingly, we hold that Villarreal and other pretrial detainees in similar circumstances are not entitled to the protection of the FLSA minimum wage requirement.

Villareal, 113 F.3d at 207; *accord Tourscher*, 184 F.3d at 244 ("We agree with this rationale. Tourscher's employment bears no indicia of traditional free-market employment. Therefore, we hold that the minimum wage requirements of the FLSA do not apply to Tourscher or other similarly situated pretrial detainees.").

Courts have extended this logic even further and applied this version of the economic-reality test to reject minimum-wage claims brought by *civil* detainees under the FLSA, finding that the distinction among prisoners, pretrial detainees, and civil detainees is immaterial. *See Smith v. Dart*, 803 F.3d 304, 314 (7th Cir. 2015) ("We cannot see what difference it makes if the incarcerated person is a prisoner, civil detainee, or pretrial detainee. In all cases, the aforementioned principles apply equally.").

For instance, in *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008), the court held that the FLSA does not apply to labor provided by a civil detainee committed to a treatment facility,

finding that they are not in the facility "for the purpose of enabling them to earn a living." The Seventh Circuit reasoned that Congress did not intend to impose a minimum wage in such circumstances, even if the work was used to "offset some of the costs" of the detention:

> The [facility] pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours.

Id. The First Circuit has held the same. *See Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (holding the FLSA does not apply to a civil detainee committed as a sexually dangerous person). And so has the Fourth Circuit.

In *Matherly v. Andrews*, 859 F.3d 264, 278 (4th Cir. 2017), the Fourth Circuit rejected FLSA claims based on labor performed by civil detainees for the same reasons it categorically rejected FLSA claims based on prisoner labor in *Harker*: "The *Harker* factors are applicable here and compel the conclusion that [a civil detainee] doesn't qualify as an 'employee' within the meaning of the FLSA . . . ." *See also, e.g.*, *Williams v. Coleman*, No. 1:11-CV-01189-GBC PC, 2012 WL 6719483, at *3 (E.D. Cal. Dec. 26, 2012), *aff'd*, 536 F. App'x 694 (9th Cir. 2013) ("The law is clear that prisoners may be required to work and that any compensation for their labor exists by grace of the state. There is no authority to justify a digression from this well-established law when the case involves a civil detainee rather than a prisoner.") (internal citations omitted); *Shaw v. Briody*, No. 2:02CV500FTM-33SPC, 2005 WL 2291711, at *3 (M.D. Fla. Sept. 20, 2005) (finding "that FLSA is inapplicable to . . . civil detainees housed at the FCCC").

The common thread that binds all these cases, which have unanimously rejected FLSA claims based on labor performed in a prison or detention facility is the custodial nature of the

relationship between the prisoners/detainees and their custodian. That custodial-detention relationship does not bear any indicia of traditional free-market employment situations to which the FLSA's provisions apply. Because the prisoner or detainee is removed from the national economy, because the work performed in the work program is merely incident to the incarceration or detention, and because the custodian provides for their welfare and basic standard of living, there is no need for a minimum wage.

Civil immigration detainees are no different. On remarkably similar facts, the Fifth Circuit has applied the same logic in the immigration-detention context. In *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 395 (5th Cir. 1990), the court held that immigration detainees who performed maintenance, cooking, laundry, and other services for $1 per day at their detention center were not covered employees under the FLSA. Just like prisoners, pretrial detainees, and other civil detainees, the court reasoned that immigration detainees were "removed from American industry," under the direct supervision and control of the detention facility, and "not within the group that Congress sought to protect in enacting the FLSA." *Id.* at 395–96.

In reaching this conclusion, the court further noted that Congress manifested its intent not to provide federal-minimum wages to such immigration detainees in the Immigration and Naturalization Act, which authorizes "payment of allowances to aliens for work performed while held in custody under the immigration laws," *id.* at 396 (citing 8 U.S.C. § 1555(d), and Congress then set that allowance at "a rate not in excess of $1 per day," *id.* (citing Department of Justice Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978)). This rate was substantially less than the federal minimum wage of $2.65 *per hour* in 1978, when the appropriations bill passed. *See* https://www.dol.gov/whd/minwage/chart.htm. Having itself set an allowance for immigration-detainee labor that was far below the federal minimum wage, Congress could not have intended

the FLSA's minimum-wage protections to cover labor performed at an immigration detention center under the work program it specifically funded.

Likewise here, Plaintiffs' participation in the voluntary work program at Cibola lacks any indicia of a free-market employment relationship. Plaintiffs were not at Cibola to earn a living. Like the immigration detainees in *Alvarado*, Plaintiffs were in ICE custody and detained at Cibola pending their removal proceedings. Plaintiffs were thus completely removed from participating in the national economy.

Moreover, there was no need for Plaintiffs to earn a minimum wage at Cibola because CoreCivic provided their standard of living (food, shelter, healthcare, etc.). *See Sanders*, 544 F.3d at 814. Thus, Plaintiffs' basic standard of living and welfare were protected regardless of whether they worked. To the extent that CoreCivic allegedly offset some of those costs through the work program, that allegation does not warrant a radical departure from *Harker*, *Matherly*, and the plethora of other cases discussed above, which establish that the FLSA does not apply to such custodial relationships. *See Sanders*, 544 F.3d at 814 (holding that Congress did not intend to impose a minimum wage on civil detention, even if the work was used to "offset some of the costs" of the detention).

Simply put, the economic reality of Plaintiffs' immigration detention does not give rise to an employment relationship within the meaning of the FLSA. Thus, they were not "covered employees" within the meaning of the FLSA.

C. Plaintiffs' NMMWA Claim Fails for the Same Reasons.

The statutory definitions of "employ," "employer," and "employee" under both the FLSA and the NMMWA (other than exceptions inapplicable here) are substantially the same. *Compare* N.M. Stat. § 50-4-21(A), (B), and (C), *with* 29 U.S.C. § 203)(d), (e)(1), and (g); *accord Garcia v. Am. Furniture Co.*, 689 P.2d 934, 938 (N.M. Ct. App. 1984). Thus, courts interpreting whether

an employee is covered under the NMMWA look to federal decisions interpreting the FLSA's analogous provisions as persuasive authority. *Id.* "In determining whether a person is an employee under the [NMMWA], 'the ultimate issue is whether as a matter of "economic reality" the particular worker is an employee.'" *Garcia*, 689 P.2d at 938 (quoting *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979)).

Following the Fifth Circuit's reasoning in *Alvarado*, two courts have held that immigration detainees are not covered employees under their respective state minimum-wage statutes, finding that the legislative purpose of protecting the standard of living and welfare of workers was not served because of the custodial setting. *See Menocal v. GEO Group., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (dismissing immigration detainees' claim under analogous Colorado minimum-wage statute because the facility provided for their standard of living and well-being) (citing *Alvarado*, 902 F.2d at 396); *see also Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass. App. Ct. 1124, *2 (2017) (unpublished op.), *review denied*, 94 N.E.3d 395 (Mass. 2017) ("We find no reason why Whyte's status as a detainee should result in a different outcome from Federal cases. Federal cases have excluded prison labor performed within the prison, because the primary goals of the FLSA—ensuring a basic standard of living and preventing wage structures from being undermined by unfair competition in the marketplace—do not apply in that context. The rationale of the Federal cases is equally applicable to the Massachusetts wage laws at issue here.").

Likewise here, the NMMWA's purpose is to protect the standard of living and general welfare of New Mexico workers. *See* N.M. Stat. § 50-4-19. Plaintiffs were not covered employees under the NMMWA because CoreCivic provided for Plaintiffs' standard of living and welfare. Additionally, Plaintiffs were not detained at Cibola to earn a living. They were

removed from the national economy and held in custody pending the outcome of removal proceedings. Plaintiffs' state-minimum wage claim thus fails for the same reasons their federal claim fails. *See, e.g., Padilla v. Am. Fed'n of State, Cty., and Mun. Emps.*, 11-1028 JCH/KBM, 2013 WL 12085976, at *9 (D. N.M. March 28, 2013) (finding it unnecessary to address NMMWA claim after finding that plaintiff was not a covered employee under the FLSA, noting that "both parties agree that the same legal analysis applies in both case"), *aff'd*, 551 F. App'x 941, 944 (10th Cir. 2014) ("We agree with the district court's analysis, and conclude, as a matter of law, that Padilla is not an employee for purposes of the FLSA or NMMWA.").

D. Plaintiffs' Unjust Enrichment Claim Should Be Dismissed.

To state a claim for unjust enrichment under New Mexico law, the allegations must establish that (1) the defendant knowingly benefitted at the plaintiff's expense (2) in a manner that allowing the defendant to retain that benefit would be unjust. *Ontiveros Insulation Co. v. Sanchez*, 3 P.3d 695, 698–99 (N.M. App. 2000) (citing Restatement of the Law of Restitution §§ 1, 40, 41 (1937)). The mere fact that the defendant retained a benefit at the plaintiff's expense is thus insufficient—the retention of that benefit must also be unjust. *See Sunwest Bank of Albuquerque v. Colucci*, 872 P.2d 346, 349, ¶ 12 (N.M. 1994) (citing Restatement (First) of Restitution § 19(c)) ("Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.")).

Here, Plaintiffs claim that CoreCivic was unjustly enriched is based on the same incorrect legal premise that it was unlawful to pay them less than the minimum wages under the FLSA and the NMMWA. Thus, this claim is merely derivative of the minimum-wage claims in Counts I and II, and fails because they fail. *See, e.g., Roscoe v. Fed. Home Loan Mortg. Ass'n*, 201 F.3d

449, *7 (10th Cir. 1999) (unpublished op.) ("Roscoes' unjust enrichment claim in many ways parallels their 'unconscionability' claim, and fails for the same reasons.").

Nevertheless, the unjust enrichment claim fails because there was no inequity between the parties. Any alleged benefit that CoreCivic received by paying Plaintiffs less than the minimum wage was more than offset by the fact that CoreCivic provided all of Plaintiffs' basic living expenses, including food, utilities, supplies, housing, and medical care at no cost to them. *See, e.g.*, N.M. Stat. § 50-4-22 (B) ("An employer furnishing food, utilities, supplies, or housing to an employee who is engaged in agriculture may deduct the reasonable value of such furnished items from any wages due to the employee.").

Moreover, the unjust enrichment claim fails to the extent it is based on an implied-in-fact employment contract. In New Mexico, quasi-contract theories of restitution are not available for claims "grounded in the parties' contractual relationship." *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1117 (10th Cir. 2005) (The "hornbook rule [is] that quasi-contractual remedies ... are not to be created when an enforceable express contract regulates the relations of the parties with respect to the disputed issue."). In such circumstances, the parties are to "be bound by the terms of the written agreements to which they freely commit themselves." *Id.* at 1116 (quotation omitted).

Thus, to the extent that Plaintiffs' work-program assignments during their detention at Cibola can give rise to an implied employment contract, their compensation is determined by that agreement, and any equitable claim for more compensation is barred. *See, e.g., Hydro Conduit Corp. v. Kemble*, 793 P.2d 855, 861, ¶ 12 (N.M. 1990) ("From all of this we conclude that, even though an action for unjust enrichment is not 'based on contract' in a strict theoretical sense, it is so closely related to an action which *is* so based that the immunity statute here,

Section 37–1–23, should be construed to extend immunity to an unjust enrichment claim as well as to a claim founded on a true, but unwritten, contract."). Nor do Plaintiffs allege that CoreCivic's payment of less than the federal or state minimum wages was the result of mistake or coercion. *Cf. Sunwest Bank of Albuquerque*, 872 P.2d at 349 ("Where a plaintiff has paid money in the mistaken belief that an enforceable contract exists, the plaintiff is entitled to recover the money paid, as restitution."). Thus, the value of any labor that CoreCivic allegedly retained through the work program, above the compensation Plaintiffs already received (including free living expenses), was an officious benefit to which Plaintiffs have no right to restitution. *See* Restatement (First) of Restitution § 112 ("[T]he principle that a person who officiously confers a benefit upon another is not entitled to restitution therefor."). As a matter of law, there is no unjust enrichment.

III. CONCLUSION

For these reasons, the Court should dismiss all claims.

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Dated: January 11, 2019

Respectfully submitted,

/s/ Daniel P. Struck

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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3526382.1

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Desmond Ndambi, et al., Plaintiffs, v. CoreCivic, Inc., Defendant.	Case No. 1:18-cv-3521-RDB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang (collectively, "Plaintiffs"), individually and on behalf of all others similarly situated, hereby file an Opposition to Defendant CoreCivic, Inc.'s ("CoreCivic") "Motion to Dismiss Complaint," (ECF No. 36), filed in the above-captioned case on January 11, 2019. Therein, CoreCivic argues that Plaintiffs fail to state a claim under the Fair Labor Standards Act ("FLSA"), the New Mexico Minimum Wage Act ("NMMWA"), and the New Mexico common law doctrine of unjust enrichment because federal and state minimum wage laws do not apply to detained immigrants. For the reasons set forth in the accompanying Memorandum, the Motion should be denied.

February 1, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Desmond Ndambi. et al., Plaintiffs, vs. CoreCivic Inc., Defendant.	Case No. 1:18-cv-3521-RDB

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

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CoreCivic, Inc. ("Defendant" of "CoreCivic") is a multibillion dollar private corporation that makes large profits operating immigration detention centers, prisons, and jails. CoreCivic uses the labor of civilly detained immigrants to perform essential non-security functions within its civil detention facilities. Instead of paying legally mandated minimum wages, CoreCivic pays detained immigrants, including Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang ("Plaintiffs") as little as one dollar per day for this critical labor. At the same time, CoreCivic fails to provide civilly detained immigrants basic necessities, and operates a serially deficient detention facility, according to government inspections. Plaintiffs, who worked for CoreCivic while detained for administrative purposes, allege that CoreCivic violated the Fair Labor Standards Act ("FLSA"), the New Mexico Minimum Wage Act ("NMMWA"), and the common law doctrine of unjust enrichment when it paid them less than the legally required wage for their work. CoreCivic contends that there is no limit to how little it may pay Plaintiffs, as it believes it is exempt from coverage of the FLSA and the NMMWA. However, principles of statutory construction, and the broad coverage of the FLSA, demonstrate otherwise. Accordingly, CoreCivic's Motion to Dismiss should be denied.

Virtually all the authority on which CoreCivic relies derives from claims brought by convicted prisoners who are widely recognized to be excluded from FLSA coverage. But CoreCivic's effort to extend this authority to apply here fails, as Plaintiffs were not held pursuant to a criminal conviction. Instead, the well-pled allegations of the Complaint establish that there was an employment relationship between CoreCivic and Plaintiffs whose work served CoreCivic's profit-making business and enabled Plaintiffs to purchase items to meet their basic needs. The convicted prisoner cases and their progeny, on which CoreCivic relies (including *Alvarado Guevara v. I.N.S.*, 902 F. 2d 394 (5th Cir. 1990)), the only decision to address the

FLSA in the immigration detention context) do not apply to this for-profit immigration facility and ignore the straight-forward application of the FLSA. Plaintiffs' NMMWA claims survive for the same reasons, as the New Mexico Supreme Court has rejected any categorical rule that prisoners cannot qualify as employees. Plaintiffs also state a claim for unjust enrichment under New Mexico common law, as CoreCivic benefitted from Plaintiffs' labor, which helped it operate the detention facility, while refusing to pay them the prevailing wage for their service to its business.

I. FACTS

Plaintiffs are immigrants who were civilly detained at Cibola County Correctional Center ("Cibola"), a for-profit immigrant detention facility owned and operated by CoreCivic. They were not held pursuant to a criminal charge or conviction and have since been released with authorization to reside in the United States. Compl. at ¶ 9–14, 21. Plaintiffs worked for CoreCivic during their detention performing tasks necessary for CoreCivic to operate Cibola at a profit, yet CoreCivic paid them less than the legally required wage for their work, and sometimes as little as one dollar per day. *Id.* at ¶ 2, 26, 28. Plaintiffs filed suit on behalf of themselves and others similarly situated alleging that CoreCivic violated the FLSA and the NMMWA, and unjustly enriched Defendant under New Mexico common law. *Id.* at ¶ 1.

CoreCivic is a large, publicly traded company that owns and operates detention facilities, including Cibola. *Id.* at ¶ 2. In 2017, CoreCivic reported $1.84 billion in revenue, with 48% from contracts with federal government agencies. *Id.* Cibola County, New Mexico maintains an Intergovernmental Service Agreement ("IGSA") with U.S. Immigration and Customs Enforcement ("ICE") to maintain custody of civilly detained immigrants. *Id.* at ¶ 17. In 2016, CoreCivic entered into a service contract with Cibola County in which CoreCivic agreed to serve as Cibola's independent contractor for the care and safety of civilly detained immigrants and to

operate Cibola in compliance with the terms of the IGSA between ICE and Cibola County. *Id.* at ¶ 19.

CoreCivic profits handsomely from its operation of Cibola by relying heavily on a captive workforce of civilly detained immigrants, including Plaintiffs, to perform labor necessary to keep Cibola operational and provide the services required by its service contract with Cibola County. *Id.* at ¶ 2.[1] The work includes preparing and serving meals, cleaning the facilities and performing other janitorial tasks, performing laundry services, and operating the library and the barber shop. *Id.* CoreCivic manages the work by creating, continuously revising, and implementing a facility staffing plan that accounts for the positions, hours, and pay of all detained immigrants who participate in the work program. *Id.* at ¶ 27. Through this plan, CoreCivic has the ability to hire and fire workers, control their schedules, and determine their rate and method of payment. In addition, CoreCivic provides daily supervision over the detained immigrants' work. *Id.* Guards, who were CoreCivic employees, supervised Plaintiffs' janitorial, kitchen, and library work. *Id.* at ¶¶ 34, 37, 42, 45, 50, 52. CoreCivic also provided the tools and materials—such as cleaning supplies—necessary for Plaintiffs to perform their work. *Id.* at ¶¶ 34, 37, 42, 45, 50, 52.

Plaintiffs used whatever modest wages they received to purchase food and personal items necessary for their daily lives. Compl. at ¶ 31. CoreCivic often served insufficient amounts of food, at unsafe temperatures, and/or without hygienic food-handling safeguards. *Id.* at ¶ 30. It also failed to provide adequate access to telephones and legal materials. *Id.* For instance, a January 2018 inspection by ICE's Office of Detention Oversight found the facility to be deficient

[1] While Defendant states that it is "required to maintain a voluntary work program for ICE detainees," Def.'s Mem. in Supp. Mot. Dismiss ("Mot.") at 2 (erroneously citing Compl. at ¶ 26), that statement is not supported by the allegations of the Complaint.

in no fewer than 31 contractually imposed standards. *Id.* at ¶ 32. Because of these deficiencies, Plaintiffs used their wages to purchase items, such as food, toiletries, and phone calls, that met their basic needs. *Id.* at ¶ 31.

Plaintiffs worked at jobs such as kitchen worker, janitor, librarian, laundry worker, and barber, sometimes alongside non-detainees who live in the surrounding community and who performed the same work. *Id.* at ¶ 2. By paying sub-minimum wages to Plaintiffs whose work was, and could have been, performed at market rates by members of the community, CoreCivic depressed the wages paid for work in this broader community in violation of the FLSA and the NMMWA, and was unjustly enriched under New Mexico common law. *See id.* at ¶¶ 2, 24.

II. LEGAL STANDARDS

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In considering a motion to dismiss, the court must accept as true all factual allegations and draw all reasonable inferences in the plaintiff's favor. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994).

A federal court interpreting state law "must look first and foremost to the law of the state's highest court, giving appropriate effect to all its implications." *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998). The state's highest court need not have examined identical facts so long as a fair reading of its precedent leads to a clear conclusion. *Id.* If the highest court has not addressed the issue directly or indirectly, a federal court may look to

intermediate state court decisions to anticipate how the highest court would likely rule. *Liberty Univ., Inc. v. Citizens Ins. Co. of Am.*, 792 F.3d 520, 528 (4th Cir. 2015).

III. ARGUMENT

A. Plaintiffs are "Employees" Protected by the FLSA.

1. The plain statutory language of the FLSA, and its stated Congressional purpose, compel application of the FLSA to civilly detained immigrant workers.

Plaintiffs are immigrants who performed work for CoreCivic while civilly detained awaiting processing of their immigration cases and, therefore, are encompassed within the protections afforded by the FLSA. *See* 29 U.S.C. § 202. The plain text and legislative history of the FLSA confirm that immigrant workers, whether detained or not, qualify as "employees" entitled to the statute's protection. The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," § 203(d), and "to employ" as "to suffer or permit to work." § 203(g). The Fourth Circuit has described this framework for determining an employment relationship as "the broadest definition that has ever been included in any one act." *Salinas v. Com. Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017) (quoting *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)). As a result, courts must interpret FLSA coverage expansively. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985); *Nationwide Mut. Ins. Co. v Darden*, 503 U.S. 318, 326 (1992).

The FLSA enumerates specific, limited exceptions to the broad definition of "employee," none of which relates to immigration or detention status.[2] 29 U.S.C. §§ 203(e)(3), (e)(4).

[2] As will be explained below, the same statutory construction argument does not apply to certain types of prisoners and those detained for punitive and rehabilitative purposes because the Thirteenth Amendment allows prisons to compel labor in that context.

Courts have long held that under the FLSA's remedial framework, categories of workers not on the list of specific exclusions, are covered so long as the worker otherwise meets the definition of employee. *See Patel v. Quality Inn South*, 846 F.2d 700, 702 (11th Cir. 1988) ("This definitional framework – a broad general definition followed by several specific exceptions – strongly suggests that Congress intended an all encompassing definition of the term 'employee' that would include all workers not specifically excepted."); *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 934 (8th Cir. 2013) (Congress showed it "knows how to" limit this broad definition of employee when it means to, and did not do so for undocumented workers); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1990) ("[S]pecificity in stating exemptions strengthens the implication that employees not thus exempted … remain within the Act."); *Amaya v. Power Design, Inc.*, 833 F.3d 440, 445 (4th Cir. 2016) (applying same principle of statutory construction to interpret FLSA coverage).

This Court should not create an exception for detained immigrants where one does not exist. In an analogous context, courts have consistently declined to carve out an exception for undocumented workers where it was not enumerated in the FLSA. *Patel*, 846 F.2d at 705 (undocumented workers are "employees" under FLSA); *Lucas*, 721 F.3d at 933–37 (same); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (it is well established that FLSA protections apply whether immigrant is documented or undocumented); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 (D. Md. 2008) (federal courts consistently recognize that the FLSA encompasses undocumented workers). For more than 60 years, the U.S. Department of Labor ("DOL"), which is charged with interpreting and implementing the FLSA, "has consistently taken the position that FLSA coverage extends to undocumented workers." *Colon v. Major Perry Street Corp.*, 987 F. Supp. 2d 451, 455 (S.D.N.Y. 2013) (noting that DOL after

WWII opined that noncitizen prisoners of war were covered by the FLSA and entitled to minimum wage). Indeed, courts have declined to infer an exception to FLSA coverage, even where a subsequent statute prohibits the employment of undocumented workers, because amendments by implication are disfavored. *E.g. Patel*, 846 F.2d at 704 (declining to find that an immigration statute implicitly amended the FLSA to exclude undocumented workers, and citing *Rodriguez v. United States*, 480 U.S. 522 (1987) (requiring a new statute to show a "clear and manifest" intent to amend the prior statute)). Notwithstanding this precedent, CoreCivic contends that immigrant workers whose coverage by wage and hour laws is well-established lose coverage simply because they are detained while their immigration status is determined. Access to such important rights cannot turn on such a flimsy distinction.

Furthermore, prohibiting the payment of substandard wages to civilly detained immigrants is consistent with Congress' purpose in enacting the FLSA. Congress specifically found that permitting an employer to pay substandard wages would permit "an unfair method of competition" to flourish, directly violating one of Congress' findings and declarations of policy. 29 U.S.C. § 202.[3] The Supreme Court emphasized this key Congressional purpose in *Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290 (1985), holding that a non-profit religious foundation that engaged in various business enterprises was required to pay FLSA wages to allegedly-volunteer "associates" who staffed these enterprises, or else it would have an advantage over its business competitors. *Id*. at 299 ("It is exactly this kind of 'unfair method of competition' that the Act was intended to prevent[.]"). The Court further noted that an exception

[3] 29 U.S.C. section 202(a)(3) provides:

The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers….(3) constitutes an unfair method of competition in commerce;…

to FLSA coverage "would affect many more people than those workers directly at issue …and would be likely to exert a general downward pressure on wages in competing businesses." *Id*. at 302. Plaintiffs allege precisely the same negative economic effect on the local market here, as CoreCivic's employment of Plaintiffs at well below the minimum and prevailing wage in Cibola County "suppresses wages in the local labor market." Compl. at ¶¶ 3, 23–24. Through its payment of substandard wages to Plaintiffs, CoreCivic gains an unfair advantage over other for-profit companies that would provide the same services to Cibola County while employing local workers at prevailing wages. The FLSA is intended to prohibit this very conduct.

2. Applying the "economic reality" test, an employment relationship existed between Plaintiffs and CoreCivic.

Applying these principles, the conclusion is plain that, while performing work for CoreCivic, Plaintiffs were "employees" under the FLSA. There is no question that CoreCivic qualifies as an "employer" under the FLSA, 29 U.S.C. § 203(s)(1)(A)(ii), with annual gross income far in excess of the statutory threshold of $500,000. Plaintiffs are likewise covered by the FLSA, as they are not subject to any of the specific statutory exclusions. 29 U.S.C. § 203(e).

Once coverage of Plaintiffs and CoreCivic is established, the remaining question is whether CoreCivic "employed" Plaintiffs under the FLSA. The answer turns on the economic reality test, which asks whether the worker is economically dependent on the business to which she is providing labor. *Kerr v. Marshall University Board of Governors*, 824 F.3d 62, 83 (4th Cir. 2016). While no single factor is dispositive, "relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* Plaintiffs need only plausibly allege that

they are employed under the economic reality test to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678.

Here, Plaintiffs have plausibly alleged an employment relationship with CoreCivic. Defendant created, continuously revised, and implemented a facility staffing plan that accounts for the positions, hours, and pay of all detained immigrants who participate in the work program. Compl. at ¶ 27. Through this plan, it had the ability to hire and fire workers, control their schedules, and determine their rate and method of payment. In addition, Defendant provided daily supervision over the detained immigrants' work. *Id.* CoreCivic employees supervised Plaintiffs' janitorial, kitchen, and library work. *Id.* at ¶¶ 34, 37, 42, 45, 50, 52. CoreCivic also provided the tools and materials—such as cleaning supplies—necessary for plaintiffs to perform their work. *Id.* at ¶¶ 34, 37, 42, 45, 50, 52. Taken together, these allegations are more than sufficient to satisfy this low threshold for pleading the existence of an employment relationship under the FLSA.

The conclusion that Plaintiffs were employed by CoreCivic is reinforced by the fact that CoreCivic benefitted financially from Plaintiffs' work. *See* Compl. at ¶ 26 (the work performed "benefit[s] CoreCivic because [it is] integral to Cibola's operation and the company's profitable performance of its service contract with Cibola County."); *Alamo Found.*, 471 U.S. at 299–300 (distinguishing associates who worked in the defendant's commercial businesses from trainees in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947), who were not employees because the business derived no benefit from their work); *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 139–40 (4th Cir. 1999) (holding that volunteers on non-profit rescue squads were not jointly employed by the city because they did not work "necessarily and primarily for the benefit" of the

city, their work did not displace other workers who would have sold their labor for the prevailing wage, and the relationship did not exploit unorganized laborers).

In contrast to the *Benshoff* volunteers, Plaintiffs allege that their work was essential to the Cibola facility operations and for CoreCivic to fulfill its contractual obligations to Cibola County. Defendant clearly derived a benefit from Plaintiffs' labor. Compl. at ¶¶ 2, 26, 34, 46, 52. Plaintiffs performed work that was essential to this operation – CoreCivic was required to feed the detained immigrants, provide for their personal hygiene, clean the facilities, provide clean laundry, maintain a library, and maintain and clean the premises. *Id.* at ¶ 26. CoreCivic, in turn, employed Plaintiffs to meet these requirements. *Id.* Further, Plaintiffs' employment displaced other local workers (who sometimes worked alongside them). *Id.* at ¶¶ 37, 51. Had CoreCivic not paid Plaintiffs and other detained workers substandard wages to perform work necessary to operate Cibola, it would have had to employ workers from the surrounding community at the prevailing wage. Compl. at ¶¶ 46, 52. Taken together, these facts more than plausibly allege that Plaintiffs were employed by CoreCivic and are protected by the FLSA and the NMMWA.

3. The cases on which CoreCivic relies involving prisoners, pre-trial criminal detainees, and similarly committed individuals are inapplicable here.

Plaintiffs' claims should be analyzed in the proper context, *i.e.*, for-profit civil detention of immigrants, not the prisoner context on which Defendant relies. The cases Defendant relies upon that analyze workers incarcerated in prison, pre-trial criminal detention, and involuntary commitment simply do not apply here. Nevertheless, even if the Court applies the factors from such cases to the for-profit immigrant detention business here, the same factors require FLSA coverage.

a. Prisoner cases are inapplicable.

While CoreCivic relies primarily upon cases finding convicted prisoners are exempt from coverage under the FLSA, Mot. at 4–7, those cases rest on a premise, wholly inapplicable here, that the U.S. Constitution sanctions unpaid prison work. U.S. Const. amend XIII, § 1. Plaintiffs here, of course, have been detained civilly rather than pursuant to a criminal conviction. As a result of this distinction, the corrective and punitive purpose of incarceration after criminal conviction (with its Constitutionally-protected "involuntary servitude") has no applicability to the civil detention of immigrants.

The reasoning adopted by the courts to justify exemption of persons incarcerated because of criminal conviction from FLSA coverage is wholly inapplicable to the civil detention to which Plaintiffs were subjected. Some courts have ruled that because a prison could order an inmate to work as part of his punishment, the work cannot qualify as an employment relationship. *E.g. Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) ("[I]n cases such as *Hale* and *Vanskike*, in which the prisoner is legally compelled to part with his labor as part of a penological work assignment and is paid by the prison authorities themselves, the prisoner may not state a claim under the FLSA, for he is truly an involuntary servant to whom no compensation is actually owed.") (emphasis omitted) (citing *Hale v. Arizona*, 967 F.2d 1356, 1394 (9th Cir. 1992) and *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)). Other courts have concluded that purportedly "voluntary" labor in the prison context is not employment because the prison retains authority to compel the inmate's labor. *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d. Cir. 1996) ("The prisoner [who volunteers] is still a prisoner; the labor does not undermine FLSA wage structures; the opportunity is open only to prisoners; and the prison could order the labor if it chose.").

The contrast to the circumstances here cannot be overstated. Plaintiffs in the present case were not detained pursuant to a criminal conviction, for which their confinement serves a punitive purpose. Compl. at ¶ 21. On the contrary, Plaintiffs were detained civilly while their immigration status was resolved. *Id.* The purpose of their detention was to ensure their presence during the administrative process and, if necessary, to ensure their availability for removal from the United States if ordered. *Id. See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."). Because the Thirteenth Amendment exception to involuntary servitude does not apply to immigrants held for administrative purposes, CoreCivic has no authority to compel detained immigrants at Cibola to work in the positions available. *See Owino v. CoreCivic, Inc.*, No. 17-cv-1112-JLS (NLS), 2018 WL 2193644, at *25 (S.D. Cal. May 14, 2018) (holding that plaintiffs were employees covered by state minimum wage laws where it was "not clear that [a for-profit immigrant detention facility] exerts the same level of control over [p]laintiffs as a prison does over a prisoner"). As a result, CoreCivic's categorical approach to avoid FLSA coverage in prisoner cases does not apply here.

Alternatively, some courts reason that the custodial nature of a prisoner's incarceration removes him from the economy and the protective scope of the FLSA. For example, in *Harker v. State Use Industries*, 990 F.2d 131, 133 (4th Cir. 1993), the Fourth Circuit held that a plaintiff prisoner was not covered by the FLSA when he made goods through a rehabilitation program that prepared prisoners for private employment after their release. The Court relied on three factors: (1) the plaintiff did not work to generate a profit for the prison but rather for rehabilitative purposes, (2) there was no bargained-for exchange of labor, and (3) the purpose of the FLSA to maintain a standard of living for workers was not served because the Department of

Corrections provided for the plaintiff's basic needs. *Id.* Applied to the facts of the present case, *i.e.*, Plaintiffs' civil detention in a for-profit facility, these factors warrant the opposite result from *Harker*.

The first two factors are intertwined with the worker's prisoner status. First, because incarceration serves a rehabilitative purpose, the prison in *Harker* could require performance of work for that purpose. Here, by contrast, Plaintiffs were detained purely for administrative reasons. Compl. at ¶ 21. Their detention did not serve a punitive, corrective, or rehabilitative purpose, as Plaintiffs have not been convicted of, or even charged with, an offense warranting punishment or rehabilitation. *See id.* Furthermore, unlike in *Harker*, Plaintiffs here participated in the work program at Cibola to earn a wage. And, unlike the rehabilitative purpose of the work in *Harker,* Plaintiffs' work was necessary to the profitable operation of CoreCivic's business. *Id.* at ¶¶ 2, 26.

Second, because the plaintiff in *Harker* was a prisoner, he could not participate in the type of "'bargained-for exchange of labor' for mutual economic gain that occurs in a true employer-employee relationship." *Harker*, 990 F. 2d at 133 (citing *Vanskike v. Peters*, 974 F.2d at 809). Rather, the Department of Corrections had the authority to compel him to work and, although this program was purportedly voluntary, he could not walk off the job. *Id.* Here, on the other hand, CoreCivic did not have the authority to compel Plaintiffs to work. Rather, Plaintiffs' participation in the work program involved mutual economic gain, enabling them to purchase basic necessities, and more closely resembled the traditional bargained-for exchange than that in *Harker*. *See* Compl. at ¶ 31.

The third factor—that the inmate's basic needs were met in *Harker* and, therefore, the FLSA was unnecessary to ensure a minimum standard of living for workers—is at odds with the

facts alleged in the Complaint.[4] CoreCivic failed to provide Plaintiffs with all their basic necessities. Compl. at ¶ 30. Defendant often served insufficient amounts of food, at unsafe temperatures, and/or without hygienic food-handling safeguards. *Id.* CoreCivic also failed to provide adequate access to telephones and legal materials. *Id.* In fact, a January 2018 inspection by ICE's Office of Detention Oversight found the facility to be deficient in no fewer than 31 contractually imposed standards. *Id.* at ¶ 32. Because of these deficiencies, Plaintiffs used their wages to purchase items, such as food, toiletries, and phone calls that met their basic needs. *Id.* at ¶¶ 30–32.

Further, finding that Plaintiffs are covered by the FLSA serves several of the statute's protective purposes, in addition to safeguarding Plaintiffs' standard of living. *See* 29 U.S.C. § 202(a) (describing numerous ways the FLSA was intended to protect labor markets from the detrimental effects of substandard wages). Plaintiffs' employment displaces non-detained workers, who would be entitled to be paid the prevailing wage, which is significantly higher than the wage paid to Plaintiffs. Compl. at ¶¶ 2, 37, 46, 51, 52. Thus, applying the FLSA's minimum wage protections to Plaintiffs protects the standard of living of other workers in the local community. Further, because Plaintiffs' work is a critical component of the operation of CoreCivic's for-profit business, the requirement that it pay Plaintiffs at least the minimum wage protects the local labor market from unfair competition and other employers from having to compete on an uneven playing field.

[4] Even if Plaintiffs' basic needs were satisfied, and the third factor did not demonstrate an employment relationship, the first two factors are more than sufficient to justify the application of the FLSA here. *See Schultz v. Capital Int. Sec., Inc.*, 466 F.3d 298, 305 (4th Cir. 2006) ("No single factor is dispositive; again, the test is designed to capture the economic realities of the relationship between the worker and the putative employer.").

b. Pre-trial criminal detention and involuntary commitment cases are inapplicable.

Defendant next relies on inapposite cases involving criminal pre-trial detainees and persons involuntarily committed to civil detention as a result of their prior convictions for sexual offenses to argue that any custodial relationship categorically removes the worker from FLSA coverage. Mot. at 8–10. CoreCivic's reliance is misplaced, as these cases apply the reasoning of the prisoner cases discussed above and are therefore equally inapplicable here. *E.g. Villareal v. Woodham*, 113 F.3d 202, 206–07 (11th Cir. 1997) (comparing pre-trial detainees to prisoners and finding that the plaintiff's work was removed from the national economy); *Tourscher v. McCullough*, 184 F.3d 236, 243–44 (3d Cir. 1999) (relying on *Villareal* to hold that the FLSA did not apply to work performed during the two-week period in which a prisoner became a pre-trial detainee during his appeal process), and *Matherly v. Andrews*, 859 F.3d 264, 278 (4th Cir. 2017) (applying the *Harker* factors to determine that the plaintiff, who was involuntarily committed as a sexually dangerous person after serving a sentence for possession of child pornography, was not an employee under the FLSA). As with *Harker*, the rationale in each case fails when applied to the facts here.

As a threshold matter, even in *Villareal*, *Tourscher*, and *Matherly*, the plaintiffs' detention was derived from, or connected to, criminal charges against them and the circumstances of their detention involved levels of control not present here. For example, the plaintiff in *Matherly* was involuntarily committed for protective and rehabilitative purposes. *See* 859 F.3d at 268, 276 (describing the plaintiff's confinement under the Adam Walsh Act, 18 U.S.C. § 4248, which establishes a system of civil commitment for sexually dangerous persons and requires suitable care and treatment). Because of his designation as a sexually dangerous person, he could be subjected to more control targeted to his condition. *Matherly*, 859 F.3d at

276; 18 U.S.C. § 4247 (defining a "suitable facility" as one that provides suitable "care or treatment given the nature of the offense and the characteristics of the defendant").

In *Villareal*, the court explained that "the more indicia of traditional, free-market employment the relationship between the prisoner and his putative 'employer' bears, the more likely it is that the FLSA will govern the employment relationship." 113 F.3d at 207 (quoting *Henthorn*, 29 F.3d at 686); *see also Tourscher*, 184 F.3d 243–44 (quoting *Villareal* and finding no indicia of traditional free-market employment when a prisoner worked in the prison for two weeks between his appeal and retrial). The relationship between Plaintiffs' work and wider labor markets is overwhelmingly clearer here than in *Villareal, Tourscher*, or *Matherly*. In each of those cases, the work performed internally did not generate a profit for the prisons involved whereas in the present case CoreCivic is a for-profit company and Plaintiffs' work operating the facility directly impacted its profits and ability to fulfill its contractual obligations. In addition, Plaintiffs' work displaced workers from the community and suppressed the value of labor in those jobs.

A case with facts closer to those pled by Plaintiffs here is *Gonzales v. Mayberg*, where the court held that the plaintiff, a civilly committed sex offender who worked in a halfway house, was covered by the FLSA in part because there was evidence he displaced other workers. No. CV-07-6248 CBM (MLG), 2009 WL 2382686, at *4 (C.D. Cal. July 31, 2009). The plaintiff in *Gonzales* also used his wages to pay for medical care. *Id.* In *Matherly*, the Fourth Circuit distinguished the facts of *Gonzales*: "The plaintiff [in *Gonzales*] alleged that he used his income to pay for a necessity of life (medical care), which raised an inference that the purpose of the FLSA was left unfulfilled." *Matherly*, 859 F.3d at 278. Although the court emphasized that the *Harker* factors were controlling precedent, *Matherly* demonstrates that the factors compel a

different outcome where the plaintiff used his wages to pay for basic necessities. Here, not only were Plaintiffs in an entirely different custodial situation than that implicated by the first two *Harker* factors, the third factor shows they were employees because Plaintiffs used their wages to pay for basic necessities such as food, toiletries, and phone calls that Defendant failed to provide.

c. This Court need not and should not follow the Fifth Circuit's decision in *Alvarado Guevara v. I.N.S.*

CoreCivic cites only one case that involves detained immigrant workers. Mot. at 11 (analyzing *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 395 (5th Cir. 1990) (per curiam)). *Alvarado Guevara*, however, is a decision issued nearly 30 years ago in another circuit about an outmoded detention system—not the modern for-profit system at issue in the present case—that ignores the plain requirements and purposes of the FLSA. In a per curiam opinion with little analysis,[5] the Fifth Circuit held that immigrants who were detained and worked for the Immigration and Naturalization Service—a now defunct agency of the U.S. government—were not covered by the FLSA. *Alvarado Guevara*, 902 F.2d at 395. The court ruled without considering the FLSA's statutory definition of "employee" (discussed *supra,* Part A.1), or whether plaintiff in that case was included within that definition. Further, the court failed to examine how the custodial setting of detained immigrants differs from that of prisoners. *Owino*, 2018 WL 2193644, at *25 ("*Alvarado Guevara*'s reasoning presupposes that the immigration detention facility exerts nearly the same level of control over a detainee as a prison does over a prisoner. . . Here, it is not clear that [d]efendant [a private immigration detention facility] exerts the same level of control over [p]laintiffs as a prison does over a prisoner). The court in

[5] The Fifth Circuit stated only that it upheld the District Court's opinion and attached an excerpt thereof. *Alvarado Guevara*, 902 F.2d at 395.

Alvarado Guevara, also misconstrued or misapplied the FLSA's stated purposes, reasoning that the FLSA was enacted "to protect the 'standard of living'. . . of the worker in American industry" and that the plaintiffs were not covered because they were removed from American industry, 902 F.2d at 396, but ignoring the FLSA's goals of preventing unfair competition and protect labor markets that the Supreme Court emphasized in *Alamo Foundation*, 471 U.S. at 299.

Unlike *Alvarado Guevara*, Plaintiffs here were employed by a private, for-profit company, not the federal government or any other governmental entity. For all the reasons previously explained *supra*, Plaintiffs were not removed from American industry. Indeed, CoreCivic injected them directly into American industry by relying in large part on their labor to operate Cibola at a profit. In the nearly three decades since *Alvarado Guevara* was decided, the immigrant detention system has changed drastically. Detention facilities have been increasingly privatized: In 2005, 25% of detained immigrants were held in private facilities; in 2009 the number increased to 49%, and in 2016 it increased to 73%. Private immigrant detention centers generate large profits using the labor of detained immigrants, who are held for administrative purposes, not because they are criminally charged. In 2017, CoreCivic reported $1.84 billion in revenue, with 48% from contracts with federal government agencies. Compl. at ¶ 2. CoreCivic profits from its operation of Cibola by relying heavily on a captive workforce of civilly detained immigrants, including Plaintiffs, to perform labor necessary to keep Cibola operational and provide the services it is obligated to provide under the terms of its contract with Cibola County. *Id.* The modern for-profit detention scheme exploits the immigrants, while suppressing the value of the labor required to operate the facilities and displacing workers who could otherwise be hired at the prevailing wage. This new context, along with the ways in which Plaintiffs' labor is

intertwined with labor markets broadly, is plainly distinguishable from *Alvarado Guevara* and requires FLSA coverage.

Relying only on *Alvarado Guevara* and citing 8 U.S.C. § 1555(d), an Immigration and Naturalization Service ("INS") appropriation statute,[6] CoreCivic argues that Congress intended that detained immigrants be exempt from FLSA coverage because Section 1555(d) appropriated funds for INS to pay detained immigrants and the 1978 Department of Justice Appropriation Act set an amount less than the minimum wage. Mot. at 11-12. This Court should reject this extension of *Alvarado Guevara* and Section 1555 to the private, for-profit detention context, and instead follow the more recent, analogous decisions from courts that explicitly reject the predominance of Section 1555 over state law minimum wage claims brought against private detention centers. *State of Wash. v. GEO Group*., 283 F. Supp. 3d 967, 976–77 (W.D. Wash. 2017) (denying motion to dismiss state law minimum wage claims as pre-empted by § 1555); *Chao Chen v. GEO Group, Inc*., 287 F. Supp. 3d 1158, 1165–66 (W.D. Wash. 2017) (same); *Novoa v. GEO Group*., No. EDCV-17-2514 JGB (SHKx), 2018 WL 3343494, at *4–5 (C.D. Cal. June 21, 2018) (same); *Owino,* 2018 WL 2193644, at *20 (same). There is no principled reason to reject the sound reasoning in these recent pre-emption cases, which allow state minimum wage claims to stand, simply because federal, rather than state, minimum wage claims are instead pled here.

State of Washington, *Chen*, *Novoa*, and *Owino* all find that there is much space in the sparse Section 1555 framework for state minimum wage law to apply to detainee wages. The

[6] Section 1555(d) states in relevant part:

Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for…(d) payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigrations laws, for work performed;

same can be said for the FLSA and the NMMWA claims pled here. *State of Washington* held that Congress, through Section 1555, had "not chosen to occupy the field of detainee wages." 283 F. Supp. 3d at 977. "[A]lthough § 1555(d) is still in effect, Congress has not specified any rate for detainee work since fiscal year 1979…. At least since fiscal year 1979, Congress has abandoned direct appropriations for payment of allowances, despite its awareness of how to do so." *Id*. (citations omitted). *See also Chao Chen*, 287 F. Supp. 3d at 1165–66 (holding the same); *Novoa*, 2018 WL 3343494, at *4–5 (same).[7]

Together, the factual differences between this case and *Alvarado Guevara* (which is not controlling and ignores the plain requirements of the FLSA) and the profound shift over decades from INS detention to for-profit detention centers render *Alvarado Guevara* and Section 1555 (a quasi-abandoned, stand-alone statute) inapposite here.

B. Plaintiffs are Employees under the NMMWA

CoreCivic concedes that the NMMWA largely follows the definition of the employment relationship from the FLSA and should be interpreted in accordance with the FLSA. Mot. at 12–13. Plaintiffs agree. Because as demonstrated, *supra*, Plaintiffs are employees under the FLSA, they are also employees under the NMMWA. *See* N.M. Stat. § 50-4-21 (defining "employee" to be "any individual employed by any employer [with exclusions not relevant here], and to "employ" to include "to suffer or permit to work."); *Garcia v. Am. Furniture Co.*, 101 N.M. 785,

[7] Application of Section 1555 here, moreover, would constitute an implicit amendment to the plenary coverage of the FLSA. As the courts have widely recognized, amendments by implication are heavily disfavored. *Rodriguez v. United States*, 480 U.S. 522 (1987) (requiring a new statute to show a "clear and manifest" intent to amend the prior statute); *Patel*, 846 F.2d at 704 (finding that the Immigration Reform and Control Act of 1986 did not amend the FLSA by implication and emphasizing the FLSA's broad remedial purposes). In the 60 years since Section 1555 was enacted, Congress could have exempted detained immigrants or for-profit detention center operators from FLSA coverage. It has not done so.

789 (1984) (stating that the economic reality test is the standard to determine whether an employment relationship exists). Under New Mexico law, "[f]acts such as pay, contract, control and voluntary action are part of the total employment situation which disclose the economic reality." *Garcia*, 101 N.M. at 789 (1984). Plaintiffs have plausibly pled these factors establishing an employment relationship between Plaintiffs and Defendant.

Moreover, even if New Mexico courts were to apply prisoner case law to this case, the New Mexico Supreme Court has made clear that Plaintiffs are employees. In *Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214 –215 (1996), the New Mexico Supreme Court held that prisoners who worked for a private company outside the prison could be employees for the purposes of workers compensation. The court emphasized that the plaintiff worked alongside non-prisoners and noted that under New Mexico law, the state did not have the authority to compel the plaintiff to work. *Id.* at 214. These factors were included in the economic reality test and led to the court's holding that the lower court erred by concluding as a matter of law that plaintiff was not an employee. *Id.* at 215.

Here, Plaintiffs have alleged that they worked alongside non-detained workers and CoreCivic had no authority to compel their labor. To the extent a New Mexico court would consider other factors used in prisoner cases in other jurisdictions, Plaintiffs have shown that they are employees because their work generates a profit for CoreCivic (a private company), displaces other non-detained workers, and suppresses wages in the labor market. Compl. at ¶¶ 2, 26, 34, 37, 46, 51, 52. Further, Plaintiffs used their wages to provide for their basic necessities. *Id.* at ¶ 31.

C. Plaintiffs Have Stated a Claim for Unjust Enrichment

Plaintiffs have stated a claim for unjust enrichment under New Mexico law and CoreCivic's arguments to the contrary are without merit. To state a claim for unjust enrichment

under New Mexico law, a plaintiff must allege that "(1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *City of Rio Rancho v. Amrep Sw. Inc.*, 260 P.3d 414, 428–29 (N.M. 2011) (internal quotations omitted). CoreCivic does not dispute that it received a benefit at Plaintiffs' expense. *See* Mot. at 14. Instead, it argues only that its retention of the benefit of Plaintiff's labor is not unjust because the FLSA and the NMMWA do not apply to Plaintiffs. *Id.* As explained above, the FLSA and the NMMWA require Defendant to pay Plaintiffs the minimum federal and state wage, respectively. Defendant's failure to follow these laws makes it unjust that they benefited from Plaintiffs' labor. Even if the federal and state wage and hour laws did not apply to Plaintiffs, CoreCivic, a multibillion-dollar company, unjustly profited from Plaintiffs' labor while paying them unconscionably low wages. CoreCivic's service contract with Cibola County incorporates the terms of the IGSA and requires it to pay its workers the prevailing wage in the community in compliance with the Service Contract Act, 41 U.S.C. § 351 *et seq*. Compl. at ¶¶ 19, 23–24.

CoreCivic next argues that that Plaintiffs cannot maintain a claim for unjust enrichment because it allegedly provided for their basic living expenses. Mot. at 15. This argument is clearly misplaced. Well-pled facts in Plaintiffs' Complaint – which must be taken as true – allege that CoreCivic failed to adequately provide for Plaintiffs' basic needs, as it was contractually required to do. Compl. ¶¶ 30–32. In addition, where CoreCivic had an independent obligation (and was paid) to provide for Plaintiffs, it cannot be said that the alleged fulfillment of such obligations compensates Plaintiffs for their labor. Most importantly, the minimum wage statute that CoreCivic cites to justify deducting its purported expenses from Plaintiffs' wages, Mot. at 15, applies only to agricultural workers: "An employer furnishing

food, utilities, supplies or housing *to an employee who is engaged in agriculture* may deduct the reasonable value of such furnished items from any wages due to the employee." N.M. Stat. § 50-4-22.

Finally, CoreCivic appears to argue that there is an implied contract between CoreCivic and Plaintiffs that limits their compensation and bars any unjust enrichment claim. Mot. at 15. Plaintiffs do not contend, as CoreCivic mistakenly believes, that the unjust enrichment claim is grounded in any contract. Instead, the unjust enrichment claim is based on an assessment of what compensation is fair for the labor Plaintiffs provided to CoreCivic. *See Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 179 (1990) (explaining that claims for unjust enrichment, unlike those enforcing implied or express contracts, "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice."); *cf. United States v. Copar Pumice Co., Inc.*, No. CV 09-1201 JAP/KBM, 2012 WL 12906517, at *6 (D.N.M. Aug. 22, 2012) (finding that the plaintiff's unjust enrichment claims were based on the defendants' failure to comply with federal law, and its claims did not seek to enforce the settlement agreement). To determine what is just, the Court need look no further than CoreCivic's own commitment to pay its employees the prevailing wage in the community. Compl. at ¶¶ 19, 23–24. And in any event, New Mexico law does not bar unjust enrichment claims that derive from implied contracts. *See Adenauer v. Conley's Landscaping, Inc.*, No. 30,271, 2012 WL 1719730, at *3 (N.M. Ct. App. Apr. 23, 2012) (collecting cases and explaining that equitable remedies may exist even where the parties are in privity of contract). CoreCivic mis-cites *Hydro-Conduit*, which held that a state sovereign immunity statute for contract claims barred unjust enrichment claims against governmental

entities. Both the statutory sovereign immunity law and CoreCivic's implied contract argument have no application here.

Plaintiffs' unjust enrichment claims are reinforced by federal and state minimum wage laws—CoreCivic's failure to comply with these laws renders their retention of Plaintiffs' labor unjust. Even if these laws did not apply, Plaintiffs have independent bases for relief because CoreCivic profited from their labor while failing to fulfill its commitment to pay its employees the prevailing wage. Justice requires an equitable remedy to correct these wrongs.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Defendant's Motion to Dismiss.

February 1, 2019

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

Desmond Ndambi, et al., individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 1:18-cv-03521-RDB
v.	)	
CoreCivic, Inc.,	)	
Defendant.	)	

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

Plaintiffs bear the burden "of proving that an employer-employee relationship exists and that the activities in question constitute employment for purposes of the" FLSA. *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 140 (4th Cir. 1999). They have failed to make that showing here. Like every other court that has addressed this issue, this Court should conclude that the FLSA does not apply to labor performed in this custodial-detention setting.

I. CIBOLA'S VOLUNTARY WORK PROGRAM IS AUTHORIZED BY CONGRESS AND REQUIRED BY ICE.

Although the Court must accept as true the factual allegations in the Complaint, it need not accept—and, in fact, should reject—hyperbole, unwarranted inferences, and unsupported assertions. Plaintiffs portray themselves as members of a "captive workforce" and victims of a "detention scheme" designed to exploit cheap immigrant-detainee labor and reap millions of dollars. (Dkt. 39-1 at 24-25.) That (false) depiction ignores the origins and purpose of Cibola's Voluntary Work Program and CoreCivic's contractual obligations under the IGSA.

CoreCivic is *required* to comply with the terms of the IGSA (Dkt. 1, ¶¶ 19, 24), and under those terms, CoreCivic is *required* to comply with ICE's Performance Based National Detention Standards ("PBNDS"). (*See* Ex. 1, IGSA at 5, 7, 15–25, 28-29.) The PBNDS, in turn, *require* CoreCivic to provide a Voluntary Work Program ("VWP") for Cibola detainees. (*See* Ex. 2, ICE PBNDS 2011, § 5.8, at 405–406 (2016 ed.), https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf.)[1] The purpose of the VWP is to reduce the negative impact of confinement through "decreased idleness, improved morale and fewer disciplinary incidents." (*Id.* at 405.) Detainee participation in the VWP is purely voluntary and a detainee can stop participating at any time. (*Id.*) Those who do participate are entitled to an allowance of at least $1.00 per day. (*Id.*)

Congress authorized these VWPs in 1950. *See* 8 U.S.C. § 1555(d) (authorizing "work performed" by "aliens, while held in custody under immigration laws"). It also directed that the amount of compensation ("payment of allowances") was to be set by Congress ("at such rate as may be specified from time to time in the appropriation Act involved"). It then set that rate: "not in excess of $1 per day." Department of Justice Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978). Thus, Congress knew (and expected) that immigration detainees in ICE custody performed labor for up to $1 per day or *even for no pay at all*. *See Guevara v. I.N.S.*, 954 F.2d 733, *2 (Fed. Cir. 1992) (unpublished decision) ("Congress was not unaware of the situation in which these detainees might find themselves, or of the practice of the INS in asking for volunteers to undertake work projects at the detention centers.").

[1] This Court may take judicial notice of the IGSA and the PBNDS because the Complaint relies on and specifically references the IGSA and CoreCivic's contractual obligation to comply with ICE standards. (Dkt. 1, ¶¶ 19, 23, 29, 32.) *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Thus, there is nothing nefarious about Cibola's VWP. Congress authorized ICE to utilize immigrant-detainee labor and set the allowance; ICE requires its contractors to offer VWPs to immigrant detainees; CoreCivic simply carries out that mandate; and Plaintiffs voluntarily participated in it. The Court should resolve whether the FLSA applies from that baseline.

II. THE FLSA DOES NOT APPLY TO LABOR PERFORMED PURSUANT TO CIBOLA'S VWP.

A. The *Harker* Analysis Governs Custodial-Detention.

In *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993), the Fourth Circuit categorically excluded inmate labor from the FLSA, explaining that Congress did not intend the Act to apply in a custodial-detention setting:

> SUI and the inmates ... have not made the "bargained-for exchange of labor" for mutual economic gain that occurs in a true employer-employee relationship. They do not deal at arms' length; the inmates enroll in SUI programs solely at the prerogative of the DOC, which both initiates the programs and allows the inmates to participate. Because the inmates are involuntarily incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment. Inmates may voluntarily apply for SUI positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day. SUI and Harker do not enjoy the employer-employee relationship contemplated in the Act, but instead have a custodial relationship to which the Act's mandates do not apply.
>
> Further, the FLSA does not cover these inmates because the statute itself states that Congress passed minimum wage standards in order to maintain a "standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). While incarcerated, inmates have no such needs because the DOC provides them with the food, shelter, and clothing that employees would have to purchase in a true employment situation. So long as the DOC provides for these needs, Harker can have no credible claim that inmates need a minimum wage to ensure their welfare and standard of living.

This reasoning applies equally here because the economic reality of Plaintiffs' custodial detention is analogous to the inmates' custodial relationship in *Harker*. Plaintiffs voluntarily participated in Cibola's VWP. There was no negotiation or bargained-for-exchange of labor for economic gain (the IGSA dictates the VWP); Plaintiffs were not free to walk out of the facility and look for other work; and when they finished an assignment, they remained in CoreCivic's supervision. In addition, CoreCivic provided Plaintiffs food, shelter, and clothing during the course of their detention. Like the inmates in *Harker*, Plaintiffs were not engaged in a "free labor situation of true employment," nor did they need work to maintain their own standard of living. *Id*.

B. The Fifth Circuit and Other Courts Have Applied This Analysis to Immigration Detainees.

In *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 395–97 (5th Cir. 1990), the Fifth Circuit applied this same reasoning to custodial labor performed by immigration detainees. The court affirmed the district court's dismissal of FLSA claims brought by immigration detainees who performed the same work as Plaintiffs—for $1 per day, *see* § 1555(d)—while in the custody of the Immigration and Naturalization Service ("INS"). *Id.*

Plaintiffs try to belittle *Alvarado Guevara* by characterizing it as a "*per curiam* opinion with little analysis." (Dkt. 39-1 at 23.) But the Fifth Circuit explained, in a **unanimous panel opinion**, that it was adopting the district court's "judgment **and persuasive reasoning.**" *Id.* at 395 (emphasis added). The district court held that Congress did not intend to cover labor performed by immigration detainees when it enacted the FLSA because they were removed from the National economy and in the custody and control of the INS. *Id.* at 396. Although inmate-labor cases were "not factually identical," "the similarity in circumstances" between inmates and immigration detainees warranted the same result because, at bottom, "the congressional intent

was to protect the standard of living and general well-being of the worker in the American industry" and applying the FLSA in either context did not serve that purpose. *Id*.

Plaintiffs argue that *Alvarado Guevara* is no longer valid law because it was decided "nearly 30 years ago," the INS is now "defunct," and immigration detention has become increasingly privatized. (Dkt. 39-1 at 23.) None of these arguments are convincing. *Alvarado Guevara* has not been distinguished, criticized, or overruled by any other court. ICE is the "successor agency to the [INS] after immigration enforcement functions were transferred from the Department of Justice to the Department of Homeland Security on March 1, 2003." *Silva Rosa v. Gonzales*, 490 F.3d 403, 404 n.1 (5th Cir. 2007). And even assuming that immigration detention has become more privatized, whether the custodian is a government agency or its private contractor is irrelevant. (*See* Section II.B, *infra*.)

Plaintiffs also incorrectly argue that *Alvarado Guevara* is "the only decision to address the FLSA in the immigration detention context." (Dkt. 39-1 at 8.) In *Guevara*, 954 F.2d 733, *1, the Federal Circuit applied the same analysis to reject FLSA claims brought by immigration detainees who were paid $1 per day for participating in a VWP at an immigration detention center in Texas. Like the Fifth Circuit, the Federal Circuit held that the FLSA did not apply. *Id*. Consistent with *Alvarado Guevara* and *Guevara*, the Department of Justice has opined that immigration detainees who perform labor at "a detention facility operated by or contracted through" the INS are not in an employment relationship for purposes of the FLSA; instead, they are similarly situated to "inmates who perform duties pursuant to prison work programs and receive gratuity for so doing." *See* INS Gen. Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities*, Op. 92-8, 1992 WL 1369347, at *1 (Feb. 26, 1992).

Plaintiffs also ignore the two recent cases cited in CoreCivic's Motion to Dismiss where courts dismissed state minimum-wage claims, employing *Alvarado Guevara*'s reasoning. *See Menocal v. GEO Group, Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (dismissing immigration detainees' claim under Colorado minimum-wage statute); *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass. App. Ct. 1124, *2 (2017) (unpublished op.) ("We find no reason why Whyte's status as a detainee should result in a different outcome from Federal cases. Federal cases have excluded prison labor performed within the prison, because the primary goals of the FLSA . . . do not apply in that context.").

While critical of these cases, Plaintiffs have not cited *any* authority holding that the FLSA applies to labor performed by immigrant detainees as part of the facility's VWP. Instead, Plaintiffs cite inapposite cases involving "undocumented aliens" **who were employed in the free market**. (Dkt. 39-1 at 12–13.) CoreCivic is not arguing that the FLSA does not apply here because of Plaintiffs' immigrant status. The FLSA does not apply because of the custodial-detention setting in which they performed their labor.

Plaintiffs also cite cases that have held that § 1555(d) does not preempt state minimum wage laws. (Dkt. 39-1 at 25-26.) But Plaintiffs once again misconstrue CoreCivic's argument. CoreCivic is not arguing that § 1555(d) **preempts** any state law. Rather, § 1555(d) is proof that Congress never intended the FLSA to apply to immigrant-detention labor. Plaintiffs' attempt to connect these preemption cases to *Alvarado Guevara* is even more futile. *Alvarado Guevara* did not hold that § 1555(d) **preempted** the FLSA (or any state law). It held that the FLSA does not apply to immigrant-detention labor "despite this apparent exchange of money for labor" authorized by § 1555(d). 902 F.2d at 396. Thus, Plaintiffs' preemption cases are inapposite.

C. The Control-Factors Test Does Not Apply.

Plaintiffs argue that the control-factors test articulated in *Kerr v. Marshall University Board of Governors*, 824 F.3d 62, 83 (4th Cir. 2016), not the custodial-detention test in *Harker*, applies. (Dkt. 39-1 at 14-15.) They are incorrect. *Kerr* did not involve a custodial relationship. In *Kerr*, a student-teaching assistant sued her teacher, alleging that the teacher was a joint employer with the University and therefore liable for minimum wages under the FLSA. 824 F.3d at 82–84. The court applied the control-factors test to determine whether the teacher was a joint employer. *Id.* That test was first adopted by the Ninth Circuit in *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), to identify who, among multiple employers in the free market, should be deemed an "employer" within the meaning of the FLSA.[2] The *Bonnette* test and control factors are inapplicable here because there is no need to identify who, among multiple parties, is an employer. Thus, this case does not involve the joint-employment situation that the control-factors test was designed to resolve.

Moreover, courts have rejected the *Bonnette* test in custodial-detention situations. The Seventh Circuit did so because the control factors "presuppose a free labor situation" and "fail to capture the true nature of the [custodial] relationship." *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992). Unlike a traditional employment relationship, it held, the control that a custodian has over an inmate, pre-trial detainee, or an immigration detainee arises from the fact of incarceration or detention itself; any control over their labor is merely incidental to that custodial-detention. *Id.* The Second Circuit, has also held that the control factors have "little relevance to the unique status of a prisoner and his or her relationship to the correctional

[2] *Kerr* relied on Second Circuit cases, which in turn quoted *Bonnette* for the control-factors test. *See Kerr*, 824 F.3d at 83.

institution," finding that their literal application would lead to "radical results" in the custodial-detention setting. *Danneskjold v. Hausrath*, 82 F.3d 37, 41–42 (2d Cir. 1996). Even the Ninth Circuit, which created the *Bonnette* test, rejected its application in an inmate case, holding that it is more useful in situations where "it is clear that some entity is an 'employer,' and the only question is which one." *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) (holding the custodial situation raises a more fundamental question: whether the inmate can "'plausibly be said to be 'employed' in the relevant sense at all?'").

Most importantly, in *Harker*, the Fourth Circuit drew a bright line, rejecting a case-by-case analysis of the control factors and *categorically* excluding all inmate FLSA claims. *See Harker*, 990 F.2d at 135 ("We believe that using this [four control factors] test in situations when an inmate works inside prison walls only encourages unnecessary litigation and invites confusion in an area of the law that should be quite clear.") (internal citations omitted). The Court should reject Plaintiffs' attempt to inject the control factors in this case.

D. Plaintiffs' Factual Distinctions Are Legally Insignificant.

Plaintiffs make several additional attempts to distinguish these custodial-detention cases from this case. None of them are persuasive.

1. Prisoner, Pre-Trial Detainee, and Involuntary-Commitment Status.

Plaintiffs argue that the custodial-detention test applied in cases such as *Harker*, *Matherly*, and *Villarreal*, should not apply here because, unlike Plaintiffs (immigration detainees), the plaintiffs in those cases have either been charged or convicted of a crime or involuntarily committed for rehabilitative purposes. (Dkt. 39-1 at 16-23.) Aside from the fact that cases like *Alvarado Guevara*, *Guevara*, and *Whyte* have extended the analysis in those cases to immigration detainees, the custodial-detention test turns, not on the reason for incarceration or detention, but on the **fact of** custodial detention. *See, e.g*, *Harker*, 990 F.2d at 133 (inmate and

prison "do not enjoy the employer-employee relationship contemplated in the Act, but instead have **a custodial relationship** to which the Act's mandates do not apply") (emphasis added).

For example, in *Matherly v. Andrews*, 859 F.3d 264, 278 (4th Cir. 2017), the Fourth Circuit applied the analysis in *Harker* to hold that a civil detainee did not qualify as an 'employee' of the Bureau of Prisons ("BOP"). The court found that the civil detainee's labor was not "the product of a bargained-for exchange," and the "BOP provide[d] him with all of his necessities, satisfying the underlying purpose of the FLSA's minimum wage provision." *Id.* The court relied on *Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008), where the Seventh Circuit explained that a civil detainee is indistinguishable from incarcerated inmates:

> As we explained …, "people are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief …. None of these goals is compatible with federal regulation of their wages and hours. . . ."
>
> If the words "confined civilly as a sexually violent person" are substituted for "imprisoned" in the first sentence and "secure treatment facility" for "prison" in the second sentence, the quoted passage applies equally to the present case . . . .

(Internal citations omitted.); *accord Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992). The Eleventh Circuit applied the same rationale to labor by pre-trial detainees in *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997), because pre-trial detainees, like inmates, are in a custodial relationship:

> Clearly, pretrial detainees are in a custodial relationship like convicted prisoners. Correctional facilities provide pretrial detainees with their everyday needs such as food, shelter, and clothing. Convicted prisoners are likewise provided these same basic needs. Additionally, like convicted prisoners, pretrial detainees suffer from loss of freedom of choice and privacy due to the nature of their confinement. In light of these similarities, we deem persuasive the cases addressing the applicability of the FLSA to convicted inmates.

Accord Tourscher v. McCullough, 184 F.3d 236, 244 (3d Cir. 1999).

Plaintiffs contend that the Court should ignore these cases and instead apply *Gonzales v. Mayberg*, 2009 WL 2382686, at *4 (C.D. Cal. July 31, 2009), which held that the FLSA applied to labor performed by a person who was civilly committed under California's Sexually Violent Predator Act. But *Gonzalez* applied the control-factors test outlined in *Bonnette*, which the district court (in the Central District of California) was bound to apply. *Id*. This Court is bound by *Harker* and *Matherly*. Nonetheless, the plaintiff in *Gonzalez* was required to use his wages to pay for his own medical care. *Id*. Plaintiffs do not make that allegation here.[3]

Plaintiffs also contend that the prisoner cases do not control because prisoners, unlike immigration detainees, can be forced to work under the Thirteenth Amendment, and the civil detainee cases do not control because civil detainees, unlike immigration civil detainees, can be forced to work for rehabilitative purposes. (Dkt. 39-1 at 16-23.) But, again, none of those cases turned on the existence of the Thirteenth Amendment. Moreover, those cases hold that the FLSA does not apply, in part, because inmates and civil detainees perform labor for goals **unrelated to** punishment or rehabilitation, including "to offset some of the cost of keeping them, or to keep them out of mischief. … None of these goals is compatible with federal regulation of their wages and hours." *Sanders*, 544 F.3d at 814; *accord Danneskjold*, 82 F.3d at 43 ("Such work occupies prisoners time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their

[3] Notably, the court in *Matherly* declined to follow *Gonzalez* because *Harker* controlled the inquiry in the Fourth Circuit. 859 F.3d at 278 fn.*. Moreover, *Gonzalez* is in the minority; other district courts, like *Matherly*, consistently hold that the FLSA does not apply in the civil detention context. *See, e.g.*, *Martin v. Benson*, 827 F. Supp. 2d 1022, 1030 n.3 (D. Minn. 2011); *Shaw v. Briody*, 2005 WL 2291711, at *3 (M.D. Fla. Sept. 20, 2005); *see also Cooke v. Johns*, 2013 WL 4500668, at *6 (E.D. N.C. Aug. 21, 2013); *Francis v. Johns*, 2013 WL 1309285, at *1 (E.D.N.C. Mar. 28, 2013).

incarceration."). Similarly, here, ICE's PBNDS specifically require CoreCivic to provide a VWP to reduce the "negative impact of confinement . . . through decreased idleness, improved morale and fewer disciplinary incidents." (Ex. 2, ICE PBNDS 2011, § 5.8, at 405.)

Thus, it does not matter whether participation in a work program was compelled or voluntary so long as the work served the institutional needs of the facility. *Danneskjold*, 82 F.3d at 43. Indeed, in *Harker* the inmates went "through a voluntary application and interview process to participate" in the prison work program. 990 F.2d at 132. Yet, the court explained that their voluntary participation did not transform the custodial relationship into an employment relationship:

> Inmates may voluntarily apply for SUI positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day.

Id. at 133; *see also Shaw*, 2005 WL 2291711, at * 3. Plaintiffs were in the exact same custodial-detention situation here. Plaintiffs' cases, which distinguish between "volunteers" and "employees" in non-custodial situations, are thus inapposite. (Dkt. 39-1 at 15–16.)

2. Private-Contractor Status.

Relying on dictum in *Villarreal*, Plaintiffs argue that CoreCivic's private-contractor status makes a difference because "the more indicia of traditional, free-market employment … the more likely it is that the FLSA will govern the employment relationship." (Dkt. 39-1 at 16). The court in *Villarreal* (Eleventh Circuit), however, cited *Henthorn v. Dep't of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994), which left the door open for such a distinction because the court (in *Henthorn*) did not categorically reject inmate claims under the FLSA. As noted above, the Fourth Circuit has taken a categorical approach based on the custodial-detention relationship, regardless of whether the putative employer was a private contractor engaged in commerce:

> **Significantly, in all of these cases, inmates performed work for private, outside employers** even though their work was done within a penal facility. **Even though the companies receiving the ultimate benefit of the work were engaged in commerce for a profit,** these courts held that the inmates did not have to be paid minimum wage.

Harker, 990 F.2d at 135 (emphasis added). As the Seventh Circuit explained, there is no legally significant distinction between the government agency and its private contractor:

> **We cannot see what difference it makes if the prison is private**. … But a simpler and more fundamental point is that employment status doesn't depend on whether the alleged employer is a public or a private body. Both public agencies and private firms have employees. But prisoners are not employees.

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005) (emphasis added). Likewise, in *Danneskjold*, 82 F.3d at 43–44, the Second Circuit held that the FLSA did not apply so long as the labor produced services for institutional use:

> **We perceive no distinction of legal consequence between those circumstances and the provision of similar services to the prison by a private contractor using prison labor.** Some tasks may be more efficiently handled by private contractors, but **the legal status of prison labor under the FLSA should not be altered by the fact that the boss works under a contract with the corrections authorities instead of as a prison employee**.

(Emphasis added.)

Like these cases, any distinction between CoreCivic and ICE is artificial because ICE maintains the same VWP in ICE-operated facilities and contractually requires CoreCivic to do the same in its facilities. (Ex. 2, ICE PBNDS 2011 at 406.) CoreCivic is acting on behalf of and at the direction of ICE. *Doe v. United States*, 831 F.3d 309, 317 (5th Cir. 2016). In any event, whether CoreCivic is a private entity or allegedly profited from the VWP makes no difference to

the economic reality of the custodial situation in which Plaintiffs worked.[4] *See*, *e.g.*, *Sims v. Magla Prod., LLC*, 2002 WL 32710133, at *3 (D.S.C. July 1, 2002), *aff'd*, 48 F. App'x 475 (4th Cir. 2002) (holding the FLSA does not apply "to work done by inmates behind prison walls for *any* type of prison-operated industry or for the prison itself."); *see also Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983) (inmates who perform blood-plasma work for private contractor inside prison was not covered by the FLSA).

3. Plaintiffs' Commissary Purchases.

Plaintiffs' allegations that they needed to use their allowances to buy *more* food at the commissary and other non-essential items, such as legal supplies and phone calls, does not change the analysis. In *Harker*, the Fourth Circuit identified the items that are essential to maintain a basic living standard: "food, shelter, and clothing." 990 F.2d at 133. It is undisputed that CoreCivic provides these necessities to Cibola detainees at no cost, regardless of whether they participate in the VWP.

Citing a January 2018 report by ICE's Office of Detention Oversight ("ODO Report"), Plaintiffs allege that CoreCivic failed to comply with "31 contractually imposed standards."[5] (Dkt. 1, ¶¶ 30–32; Dkt. 39-1 at 10.) But they fail to identify what those standards were or how they relate, if at all, to the adequacy of their food, clothing, and shelter. According to the ODO

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[4] Although the court in *Matherly*, 859 F.3d at 2178, found no indication that the detainee was "working to turn a profit for the Bureau of Prisons (BOP)," that fact was not dispositive. It relied on *Harker*, where the Fourth Circuit noted that, in all the incarceration cases it surveyed, courts have declined to extend the FLSA "[e]ven though the companies receiving the ultimate benefit of the work were engaged in commerce **for a profit**. . . ." *Id.* at 135 (emphasis added).

[5] This Court may take judicial notice of this report, which is attached as Ex. 3, Department of Homeland Security, *Office of Detention Oversight PBNDS Enforcement and Removal Operations ERO El Paso Field Office Cibola County Detention Center Milan, New Mexico January 9–11, 2018*, https://www.ice.gov/doclib/foia/odo-compliance-inspections/cibolaCountyCorrectionalCenterComplianceInspectionMilanNmJan09_11_2018.pdf. *See Tellabs*, 551 U.S. at 322.

Report, however, only three standards related to food service. And none of those related to the amount or adequacy of the food provided. (Ex. 3 at 11–12.) Moreover, the Report noted that each of the three issues (relating to the temperature of food, an unsupervised food delivery cart, and wearing gloves and hair nets) was immediately corrected. (*Id*.) Further, the Report noted that, among the 15 detainees who were interviewed, "[t]he majority of detainees reported being satisfied with facility services," with only a few exceptions. (*Id* at 5.) As it pertained to food service, five (only a third of the detainees interviewed) claimed that "the food is typically served cold and has a bad taste." (*Id*.) Although the Report noted complaints about hot food that was served warm, it also noted food was served timely, *and* "confirmed the cyclical menu has been approved by a registered dietician." (*Id*.)

Nonetheless, even if the food quality at Cibola was deficient for the reasons in the ODO Report, earning a minimum wage would not have made any difference to the quality of the food they received for free. Although Plaintiffs vaguely allege that "CoreCivic often served insufficient amounts of food," appetites are inherently subjective, and Plaintiffs' own allegations show that they were able to buy additional food items at the commissary with the allowances they did receive. There is no allegation that they must earn $7.25 per hour (the federal minimum wage) to sustain a basic standard of living. *See Vanskike*, 974 F.2d at 810-11 ("The evil of substandard wages … does not apply where worker welfare is not a function of wages.").

Regarding legal supplies and phone calls, Plaintiffs cite no authority that Congress intended to provide minimum wages to pay for such items. That Plaintiffs allegedly have such needs proves only that their situation is more analogous to incarceration than it is to a free-market situation. In any event, the ODO Report addresses only telephone signage issues and expired Lexis/Nexis subscriptions—and, in those instances, corrective action was immediately

taken for all except one requirement, which was to consistently conduct daily testing of phone equipment. (ODO Report at 12–14.) Thus, the ODO Report also does not support Plaintiffs' allegations that they were denied access to phone calls or legal supplies. But even if it did, earning a minimum wage would not have corrected these issues.

4. Suppression of Wages in the Local Labor Market.

Plaintiffs' assertions that their participation in Cibola's VWP disrupts the **local** labor market or suppresses **local** wages also does not save their claim because the FLSA's primary purpose is to protect the living standard and welfare of workers in the **National** economy. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509–10 (1950) ("In this Act, the primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation.").

Here, Plaintiffs were not participants in the **National** economy. They were removed from the National economy, in ICE custody, and detained pending the outcome of their immigration proceedings. Thus, their participation in Cibola's VWP did not compete with other employers in the National market. *See, e.g.*, *Sanders*, 544 F.3d at 814 (payment of sub-minimum wages to civil detainee presented "no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the Treatment Center does not operate in the marketplace and has no business competitors") (quoting *Miller*, 961 F.2d at 9). Nevertheless, the purpose of the FLSA is not to protect against disruptions of the **local** labor market. *See Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007) (holding activities that are "purely local in nature … fall all outside the FLSA's protections").

Although a secondary purpose of the FLSA is to ensure fair competition in interstate commerce, *see* 29 U.S.C. § 202, that purpose is protected in other ways, such as through the Services Contract Act, *see* 41 U.S.C. §§ 6701 to 6707, and CoreCivic's alleged contractual

promises to pay its *employees* the prevailing wages. Thus, this secondary concern does not transform Plaintiffs' participation in the VWP into an employment relationship covered by the FLSA. *See, e.g., George v. SC Data Ctr., Inc.*, 884 F. Supp. 329, 333 (W.D. Wis. 1995) ("This secondary purpose of the Fair Labor Standards Act is, however, ultimately unavailing to plaintiff's efforts to cast himself as an 'employee' under the act. That the goal of preventing unfair competition is subordinate to the concern for the conditions of labor under the FLSA has long been recognized."); *see also, e.g., Lockett v. Neubauer*, 2005 WL 3557780, at *5 (D. Kan. Dec. 28, 2005) ("The second purpose of the Act—to prevent unfair competition—is protected by other statutes, regulations and contract provisions. … Plaintiff does not make goods distributed outside the prison, but is assigned to work in food service at the prison. Plaintiff is not subject to FLSA simply because non-inmates could be hired to do his job.").

Finally, because ICE's PBNDS requires CoreCivic to maintain a VWP at Cibola and only detainees can participate, CoreCivic cannot simply hire outside workers to perform those tasks instead.

E. Interpreting the FLSA to Cover Immigrant-Detainee Labor Would Radically Depart from Existing Law and Binding Precedent.

Plaintiffs urge the Court to ascribe the "broadest definition" to the words "employee," "employer," and "employ" to include immigrant detainees and their custodians. (Dkt. 39-1 at 11-12.) But doing so would require the Court to ignore all of the cases that have refused to do so in holding that these words did not include prisoners, pre-trial detainees, civil detainees, immigrant detainees, and their custodians. Those courts refused to do so for good reason.

In interpreting statutes, the Supreme Court has cautioned against such literal applications of the dictionary meaning of words because statutory context also matters. *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015). "Part of a fair reading of statutory text is recognizing that

Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 848–49 (2014) (internal quotation omitted). In defining the scope of the FLSA in particular, the Supreme Court has instructed courts to consider the economic reality of the situation as a whole rather than technical concepts, *see Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961). Following that directive, the Fourth Circuit in *Harker* rejected a literal reading the FLSA, finding that Congress enacted it presuming a free-market employment situation:

> **According to Harker, because the definition of employee must be read broadly, and because the Act does not specifically exempt prisoners, the Act applies to participants in [inmate work] programs. This argument fails. It presupposes that inmates in [work] programs should be considered employees for FLSA purposes in the first place.** Even with a broad reading of this term, we see no indication that Congress provided FLSA coverage for inmates engaged in prison labor programs like the one in this case.
>
> . . . .
>
> **Ruling for Harker in this case would result in an unprecedented expansion of FLSA coverage to inmates working within the prison setting. Such an extension on our part would be no small excursion into the arena of public policy.** Forcing states to pay the minimum wage to every inmate involved in an SUI-type program would dramatically escalate costs and could well force correctional systems to curtail or terminate these programs altogether. **We also will not judicially impose a new kind of employer-employee framework upon the DOC and its inmates under the guise of interpreting the FLSA's scope**. For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. **If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts**.

990 F.2d at 133, 136 (emphasis added).

Other courts have likewise rejected a literal reading of the FLSA, finding that the statutory definitions are far too general to be useful in discerning congressional intent. *See, e.g.,*

Lockett, 2005 WL 3557780, at *3 ("Plaintiff argues he is an employee as defined in the FLSA, and reasons that prisoners are not among the workers expressly exempted by the statute. The plain language of the statute is too general to be helpful in this case. Neither Congress nor the United States Supreme Court has declared whether prisoner workers are covered by FLSA. Most federal district and appellate courts deciding similar cases have held the FLSA does not apply to prisoner laborers."); *accord Bennett*, 395 F.3d at 410 ("The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress."); *Sanders*, 544 F.3d at 814 (same); *McMaster v. Minnesota*, 819 F. Supp. 1429, 1437 (D. Minn. 1993) (holding inmate's exclusion from a "list of exempted employees does not indicate a congressional intent to confer FLSA coverage upon them."). This Court should do so as well.

III. THE SAME ANALYSIS REQUIRES DISMISSAL OF THE NMMWA CLAIM.

Plaintiffs concede that the analysis of the economic reality of their employment situation under the FLSA and the NMMWA are the same. (Dkt. 39-1 at 26.) The NMMWA claim thus fails for the same reasons above.

Despite that concession, Plaintiffs inject *Garcia v. Am. Furniture Co.*, 689 P.2d 934, 938 (N.M. App. 1984), to argue that "pay, contract, control and voluntary action" should be considered in determining the economic reality of their situation. But in *Garcia*, the court considered these factors to determine whether a volunteer softball coach was an employee of a furniture company that sponsored the softball team. *Id.* at 937. Thus, *Garcia* involved a free market situation—not any type of work performed in a custodial-detention situation.

Plaintiffs also cite *Benavidez v. Sierra Blanca Motors*, 922 P.2d 1205 (N.M. 1996). There, an inmate sued a car dealership under the Worker's Compensation Act for worker's compensation benefits arising from injuries he sustained in a work-release program for certain

state prisoners. *Id.* at 1206–07. The court found that the prisoner was entitled to benefits because the work-release program expressly permitted him to contract for employment with private employers outside the prison "at not less than the prevailing market rates" and under "similar conditions of employment as regular employees." *Id.* at 1208 (citing N.M. Stat. § 33-2-43 to 33-2-47). It distinguished *Scott v. City of Hobbs*, 366 P.2d 854, 855–56 (N.M. 1961), which relied on a worker's compensation treatise to hold that prisoners could not enter a "contract for hire," *Benavidez*, 922 P.2d at 1208, and overruled *Scott* to the extent it predated the statutes which permitted state prisoners to contract for employment, *id.* at 1208 & 1211.

Benavidez is distinguishable because neither it nor the underlying *Scott* decision mentions the economic reality test. Moreover, Plaintiffs are not seeking workers' compensation benefits, and have not been statutorily authorized to contract for employment with ICE or CoreCivic. Plaintiffs also deny the existence of an implied-employment contract. (Dkt. 39-1 at 29.)

IV. PLAINTIFFS' UNJUST-ENRICHMENT THEORY FAILS.

Plaintiffs do not dispute that equitable remedies are barred where, as here, contractual and other remedies exist at law. *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1117 (10th Cir. 2005); *accord Armijo v. FedEx Ground Package Sys., Inc.*, 285 F. Supp. 3d 1209, 1217 (D.N.M. 2018) ("New Mexico law strongly disfavors unjust enrichment claims when remedies exist under contract law."). In an attempt to avoid the bar against an equitable claim for additional compensation that results from recognizing an employment contract based on their **agreement** to participate in the VWP, Plaintiffs argue that their unjust-enrichment claim is *not* based on an implied employment contract or contractual privity between the parties. But this argument contradicts Plaintiffs' allegations that CoreCivic promised to pay "its employees" the prevailing wages under its contractual agreements with Cibola County and ICE. (Dkt. 39-1 at 29.) The argument is also difficult to reconcile with Plaintiffs' assertion that their theory of

unjust enrichment is premised on the underlying claims that it was illegal to pay them less than the minimum wage because an employment relationship may be implied from the *Bonnette* control factors. (Dkt. 39-1 at 28.)

Plaintiffs argue, however, that "[e]ven if the federal and state wage and hour laws did not apply to Plaintiffs, CoreCivic, a multibillion-dollar company, unjustly profited from Plaintiffs' labor while paying them unconscionably low wages." (Dkt. 39-1 at 29.) But Plaintiffs have not cited any authority that permits courts to disgorge "profits" or shift income from one party to another based solely on income disparity under the guise of unjust enrichment. Such a remedy would be particularly unjust here given that Plaintiffs do not allege that they expected payment of minimum or prevailing wages, and that CoreCivic accepted their services with that mutual understanding. *See Tom Growney Equip., Inc. v. Ansley*, 888 P.2d 992, 995 (N.M. Ap. 1994) ("In our view, a greater inequity would arise if the law compelled Owner to pay for services he did not request, did not authorize, and possibly did not want. We cannot remedy one wrong by inflicting a still greater injustice on another.") (internal citations omitted).

Indeed, Plaintiffs fail to respond to CoreCivic's arguments that there was no such expectation as: (1) they do not allege any mistake or coercion in CoreCivic's payment of less than the minimum wage; and (2) therefore, "the value of any labor that CoreCivic allegedly retained through the work program, above the compensation Plaintiffs already received (including free living expenses), was an officious benefit to which Plaintiffs have no right to restitution." (Dkt. 36-1 at 16.) Thus, Plaintiffs have conceded to dismiss their unjust-enrichment claim on those grounds. *See Ferdinand-Davenport v. Children's Guild*, 742 F. Supp. 2d 772, 777 (D. Md. 2010) (holding failure to respond to argument in a motion to dismiss constitutes abandonment of claim); *accord Mentch v. E. Sav. Bank, FSB*, 949 F. Supp. 1236, 1247 (D. Md.

1997) (deeming claim abandoned because plaintiff "did not specifically address" the argument in opposing summary judgment).

V. CONCLUSION

For these reasons, the Court should dismiss all claims.

Dated: March 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

N/A

/s/ Daniel P. Struck

3547166.1

EXHIBIT 1

EXHIBIT 1

EROIGSA-17-0003
INTERGOVERNMENTAL SERVICE AGREEMENT
BETWEEN THE
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS
AND
Cibola County, N.M.

This Intergovernmental Service Agreement ("Agreement") is entered into between United States Department of Homeland Security Immigration and Customs Enforcement ("**ICE**"), and Cibola County New Mexico, ("**Service Provider**") for the detention and care of aliens ("**detainees**"). The term "Parties" is used in this Agreement to refer jointly to ICE and the Service Provider.

FACILITY LOCATION:

The Service Provider shall provide detention services for detainees at the following institution(s):

Cibola County Correctional Center
2000 Cibola Loop
Milan, New Mexico 87021

The following documents constitute the complete agreement:

- Intergovernmental Service Agreement (IGSA)
- Proposal dated 10/25/16,
- Attachment 1 - RESERVED
- Attachment 2 - Title 29, Part 4 Labor Standards for Federal Service Contracts
- Attachment 3 - Wage Determination Number: 2015-2361 Dated 09/01/2016
- Attachment 4 - Quality Control Plan (TO BE PROVIDED BY THE SERVICE PROVIDER PRIOR TO AWARD
- Attachment 5 - Quality Assurance Surveillance Plan
    - 5.A. Performance Requirements Summary
    - 5.B. Sample Contract Deficiency Report
- Attachment 6 – Performance Work Statement (PWS)
- Attachment 7 – Staffing Plan (TO BE PROVIDED BY THE SERVICE PROVIDER WITH PROPOSAL)
- Attachment 8- Incorporation of DHS PREA Standards

IN WITNESS WHEREOF, the undersigned, duly authorized officers, have subscribed their names on behalf of the [Name of Service Provider] and Department of Homeland Security, U.S. Immigration and Customs Enforcement. This Agreement shall become effective upon the execution of all signatory parties below.

ACCEPTED:

U.S. Immigration and Customs Enforcement

William Quigley
Contracting Officer
Signature: [signature]
Date: 10/27/16

BOARD OF COUNTY COMMISSIONERS

APPROVED, ADOPTED AND PASSED on this 26th day of October, 2016.

[signature]
Robert Armijo
Commissioner, District I

[signature]
T. Walter Jaramillo
Commissioner, District II

ABSENT
Jack Moleres
Commissioner, District III

[signature]
Patrick Simpson
Commissioner, District IV

CIBOLA COUNTY COUNTY CLERK SEAL STATE OF NEW MEXICO

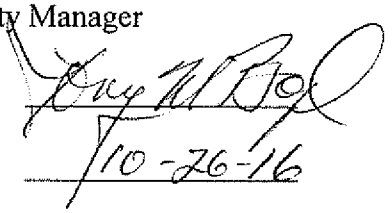
[signature]
Lloyd F. Felipe
Commissioner, District V

Attest:
[signature]
Elisa Bro
Cibola County Clerk

4/8/14

EROIGSA-17-0003

Tony Boyd
Cibola County Manager

Signature: 

Date: 10-26-16

Intergovernmental Service Agreement (IGSA)

Table of Contents:

Article 1. Purpose

A. Purpose: The purpose of this Inter-Governmental Service Agreement (IGSA) is to establish an Agreement between ICE and the Service Provider for the provision of the necessary physical structure, equipment, facilities, personnel, and services to provide a program of care in a properly staffed and secure environment under the authority of the Immigration and Nationality Act, as amended. All persons in the custody of ICE are "Administrative Detainees." This term recognizes that ICE detainees are not charged with criminal violations and are only held in custody to assure their presence throughout the administrative hearing process and to assure their presence for removal from the United States pursuant to a lawful final order by the Immigration Court, the Board of Immigration Appeals or other Federal judicial body.

B. Responsibilities: This Agreement sets forth the responsibilities of ICE and the Service Provider. The Service Provider shall provide all personnel, management, equipment, supplies, and services necessary for performance of all aspects of the Agreement and ensure that the safekeeping, housing, subsistence, medical, and other program services provided to ICE detainees housed in the facility is consistent with ICE's civil detention authority, the PWS, IGSA requirements and ICE standards referenced in this agreement. The Agreement states the services the Service Provider shall perform satisfactorily to receive payment from ICE at the rate prescribed in Article I C.

C. Rates: This is a fixed rate agreement, not a cost reimbursable agreement, with respect to the bed day rate for 1116 detainees. ICE will be responsible for reviewing and approving the costs associated with this Agreement and subsequent modifications utilizing all applicable federal procurement laws, regulations and standards in arriving at the bed day rate.

Month 1 Ramp Pricing (1-847):	$	REDACTED
(848 and above)	$	
Fixed Monthly Payment for 0-847 detainees	$	
Bed Day Rate for detainee 848 and above	$	
• Escort Services at Regular Rate	$	
• Escort Services at Overtime Rate	$	
• Stationary Guard at Regular Rate	$	
• Stationary Guard at Overtime Rate	$	
• Detainee Work Program Reimbursement	$	1.00 per day
*Transportation Costs	$TBD	

* ***See Article 17,***

If this IGSA contains a population guarantee, ICE will not be liable for any failure to meet the population guarantee if such failure directly results from an occurrence that impairs the ability to use the facility's capacity, and such occurrence arises out of causes beyond the control and without the fault or negligence of ICE. Such causes may include, but are not limited to, acts of God or the public enemy, fires, floods, freight embargoes,

the number, type and/or distribution of staff described in the staffing plan must be submitted to the CO, through the COR, for approval prior to implementation. Staffing levels shall not fall below a monthly average of 95% of the approved staffing plan.

Each month, the contractor shall submit to the COR the current average monthly vacancy rate, and indicate any individual positions that have been vacant more than 120 days. Failure to fill any individual position within 120 days of the vacancy may result in a deduction from the monthly invoice, if the vacancy in combination with other vacancies regardless of duration bring staffing levels below 95%. ICE may calculate the deduction retroactive to day one of the vacancy, excluding the days for ICE's conditional approval process, starting on the day of receipt and concluding on the day conditional approval is granted. The deduction will be based on the daily salary and benefits of the vacant position. No deduction shall apply during any period the Service Provider documents that a vacant position is covered through the use of overtime, contract staff or otherwise.

F. Consistent with Law: This is a firm fixed rate Agreement, not a cost reimbursable Agreement. This Agreement is permitted under applicable statutes, regulations, policies and judicial mandates. Any provision of this Agreement contrary to applicable statutes, regulation, policies or judicial mandates is null and void and shall not necessarily affect the balance of the Agreement.

Article 3. Covered Services

A. Bedspace: The Service Provider shall provide and operate approximately a 1116 bed adult male civil detention facility. The facility shall be located within appropriate proximity and access to emergency services (medical, fire protection, law enforcement, etc. The Service Provider will also ensure that adequate administrative space in accordance with the Physical Plant Requirements listed under Article 35 of this agreement. ICE will be financially liable only for the actual detainee days as defined in Paragraph C of Article 3.

B. Basic Needs: The Service Provider shall provide ICE detainees with safekeeping, housing, subsistence, medical and other services in accordance with this Agreement. In providing these services, the Service Provider shall ensure compliance with all applicable laws, regulations, fire and safety codes, policies and procedures. If the Service Provider determines that ICE has delivered a person for custody who is under the age of eighteen (18), the Service Provider shall not house that person with adult detainees and shall immediately notify the ICE COR or designated ICE official. ICE will remove the juvenile within seventy-two (72) hours.

C. Unit of Service and Financial Liability: The unit of service is called a "Bed Day" and is defined as one person per day. The bed day begins on the date of arrival. The Service Provider may bill ICE for the date of arrival but not the date of departure. The Service Provider shall not charge for costs that are not directly related to the housing and detention of detainees. Such unallowable costs include but are not limited to:

Article 5. ICE Performance-Based National Detention Standards and Other Applicable Standards

A. The Service Provider shall house detainees and perform related detention services at a minimum in accordance with the 2011 edition of ICE Performance Based National Detention Standards (PBNDS) unless otherwise specified in this agreement. The complete set of standards applicable to this procurement is available from the following website: http://www.ice.gov/detention-standards/2011/ and are incorporated herein. CCA may submit requests to waive compliance with PBNDS optimal standards within 180 days of the Agreement effective date. ICE Inspectors will conduct periodic inspections of the Facility to assure compliance with the ICE PBNDS.

B. If a change in the standards identified herein results in a documentable financial impact to the Service Provider, the Service Provider must notify the Contracting Officer within thirty (30) days of receipt of the change and request either 1) a waiver to the Standards or, 2) to negotiate a change in per diem.

C. The Facility's operation shall reflect the 2011 PBNDS Expected Outcomes . Where minimum requirements are expressed, innovation is encouraged to further the goals of detention reform. CCA may submit requests to waive compliance with PBNDS optimal standards within 180 days of the Agreement effective date.

D. The Service Provider shall also comply with the American Correctional Association (ACA) Standards for Adult Local Detention Facilities (ALDF) months, and Standards Supplement, Standards for Health Services in Jails, National Commission on Correctional Health Care (NCCHC). Finally, the Service Provider will comply with all required elements (listed in Attachment 8) of Subpart A of the U.S. Department of homeland Security Regulation titled "Standards to Prevent, Detect, and respond to Sexual Abuse and Assault in Confinement Facilities", 79 Fed. Reg. 13100 (Mar. 7, 2014) (DHS PREA). Some ACA standards are augmented by ICE Policy and/or procedure. In cases where other standards conflict with ICE Policy or Standards, ICE Policy and Standards will prevail. If any requirements of the DHS PREA standards conflict with the terms of the 2011 PBNDS , the DHS PREA standards shall prevail.

Article 6. Medical Services

A. The Service Provider shall be responsible for providing health care services for ICE detainees at the Facility in accordance with the 2011 PBNDS, including but not limited to: intake arrival screening, tuberculosis testing and symptom screening, on-site sick call, chronic care, over the counter and prescription medication and durable medical equipment and medical supplies.

B. In the event of an emergency, the Service Provider shall proceed immediately with providing necessary medical treatment. In such event, the Service Provider shall notify ICE immediately regarding the nature of the transferred detainee's illness or injury and

Article 7. Employment Screening Requirements

General: Performance under this Intergovernmental Service Agreement requires access to sensitive DHS information. The Service Provider shall adhere to the following.

A. Employment Eligibility: Screening criteria that may exclude applicants from consideration to perform under this agreement includes:

- Criminal conduct, either as substantiated by convictions or independent evidence
- Misconduct or negligence in employment
- Illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation
- Alcohol abuse, without evidence of rehabilitation, of a nature and duration that suggests that the applicant would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or others
- Falsification and/or omission of pertinent information to influence a favorable employment decision
- Dishonest conduct, to include failure to honor just debts
- National security concerns
- Any other legitimate nondiscriminatory reason that DHS or it components find would adversely affect the efficiency of the service.

Subject to existing law, regulations and/or other provisions of this Agreement, illegal or undocumented aliens shall not be employed by the Service Provider.

The Service Provider shall certify that each employee working on this Agreement has a Social Security Card issued and approved by the Social Security Administration. The Service Provider shall be responsible to the Government for acts and omissions of his own employees.

B. SUITABILITY DETERMINATIONS

DHS will exercise full control over granting; denying, withholding or terminating unescorted government facility and/or sensitive Government information access for Contractor employees, based upon the results of a background investigation. DHS may, as it deems appropriate, authorize and make a favorable expedited entry on duty (EOD) decision based on preliminary security checks. The expedited EOD decision will allow the employees to commence work temporarily prior to the completion of the full investigation. The granting of a favorable EOD decision shall not be considered as assurance that a favorable full employment suitability authorization will follow as a result thereof. The granting of a favorable EOD decision or a full employment suitability determination shall in no way prevent, preclude, or bar the withdrawal or termination of any such access by DHS, at any time during the term of the contract. No employee of the Contractor shall be allowed to EOD and/or access sensitive information or systems without a favorable EOD decision or suitability determination by the Office of Professional Responsibility, Personnel Security Unit (OPR-PSU). No employee of the Contractor shall be allowed unescorted access to a Government facility without a favorable EOD decision or suitability determination by the OPR-PSU.

C. BACKGROUND INVESTIGATIONS

Contract employees (to include applicants, temporaries, part-time and replacement employees) under the contract, needing access to sensitive information, shall undergo a position sensitivity analysis based on the duties each individual will perform on the contract. The results of the position sensitivity analysis shall identify the appropriate background investigation to be conducted. Background investigations will be processed through the Personnel Security Unit. Prospective Contractor employees shall submit the following completed forms to the Personnel Security Unit through the COR, no less than 5 days before the starting date of the contract or 5 days prior to the expected entry on duty of any employees, whether a replacement, addition, subcontractor employee, or vendor:

Standard Form 85P, "Questionnaire for Public Trust Positions" Form will be submitted via e-QIP (electronic Questionnaires for Investigation Processing) **(2 copies)**

FD Form 258, "Fingerprint Card" **(2 copies)**

Foreign National Relatives or Associates Statement

DHS 11000-9, "Disclosure and Authorization Pertaining to Consumer Reports Pursuant to the Fair Credit Reporting Act"

Optional Form 306 Declaration for Federal Employment (applies to contractors as well)

Authorization for Release of Medical Information

Prospective Contractor employees who currently have an adequate current investigation and security clearance issued by the Defense Industrial Security Clearance Office (DISCO) or by another Federal Agency may not be required to submit complete security packages, and the investigation will be accepted for adjudication under reciprocity.

An adequate and current investigation is one where the investigation is not more than five years old and the subject has not had a break in service of more than two years.

Required forms will be provided by DHS at the time of award of the contract. Only complete packages will be accepted by the OPR-PSU. Specific instructions on submission of packages will be provided upon award of the contract.

Be advised that unless an applicant requiring access to sensitive information has resided in the US for three of the past five years, the Government may not be able to complete a satisfactory background investigation. In such cases, DHS retains the right to deem an applicant as ineligible due to insufficient background information.

The use of Non-U.S. citizens, including Lawful Permanent Residents (LPRs), is not permitted in the performance of this contract for any position that involves access to DHS IT systems and the information contained therein, to include, the development and / or maintenance of DHS IT systems; or access to information contained in and / or derived from any DHS IT system.

D. TRANSFERS FROM OTHER DHS CONTRACTS:

Personnel may transfer from other DHS Contracts provided they have an adequate and current investigation (see above). If the prospective employee does not have an adequate and current investigation an eQip Worksheet will be submitted to the Intake Team to initiate a new investigation.

Transfers will be submitted on the COR Transfer Form which will be provided by the Dallas PSU Office along with other forms and instructions.

E. CONTINUED ELIGIBILITY

If a prospective employee is found to be ineligible for access to Government facilities or information, the COR will advise the Contractor that the employee shall not continue to work or to be assigned to work under the contract.

The OPR-PSU may require drug screening for probable cause at any time and/ or when the contractor independently identifies, circumstances where probable cause exists.

The OPR-PSU may require reinvestigations when derogatory information is received and/or every 5 years.

DHS reserves the right and prerogative to deny and/ or restrict the facility and information access of any Contractor employee whose actions are in conflict with the standards of conduct, 5 CFR 2635 and 5 CFR 3801, or whom DHS determines to present a risk of compromising sensitive Government information to which he or she would have access under this contract.

The Contractor will report any adverse information coming to their attention concerning contract employees under the contract to the OPR-PSU through the COR. Reports based on rumor or innuendo should not be made. The subsequent termination of employment of an employee does not obviate the requirement to submit this report. The report shall include the employees' name and social security number, along with the adverse information being reported.

The OPR-PSU must be notified of all terminations/ resignations within five days of occurrence. The Contractor will return any expired DHS issued identification cards and building passes, or those of terminated employees to the COR. If an identification card or building pass is not available to be returned, a report must be submitted to the COR, referencing the pass or card number, name of individual to whom issued, the last known location and disposition of the pass or card. The COR will return the identification cards and building passes to the responsible ID Unit.

F. EMPLOYMENT ELIGIBILITY

The contractor shall agree that each employee working on this contract will successfully pass the DHS Employment Eligibility Verification (E-Verify) program operated by USCIS to establish work authorization.

The E-Verify system, formerly known as the Basic Pilot/Employment Eligibility verification Program, is an Internet-based system operated by DHS USCIS, in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. E-Verify represents the best means currently available for employers to verify the work authorization of their employees.

The Contractor must agree that each employee working on this contract will have a Social Security Card issued and approved by the Social Security Administration. The Contractor shall be responsible to the Government for acts and omissions of his own employees and for any Subcontractor(s) and their employees.

Subject to existing law, regulations and/ or other provisions of this contract, illegal or undocumented aliens will not be employed by the Contractor, or with this contract. The Contractor will ensure that this provision is expressly incorporated into any and all Subcontracts or subordinate agreements issued in support of this contract.

resolution of all issues which arise from it or until the end of the regular three (3) year period, whichever is later.

B. Access to Records: ICE and the Comptroller General of the United States, or any of their authorized representatives, have the right of access to any pertinent books, documents, papers or other records of the Service Provider or its subcontractors, which are pertinent to contract compliance , in order to make audits, examinations, excerpts, and transcripts. The rights of access must not be limited to the required retention period, but shall last as long as the records are retained.

C. Delinquent Debt Collection: ICE will hold the Service Provider accountable for any overpayment, or any breach of this Agreement that results in a debt owed to the Federal Government. ICE will apply interest, penalties, and administrative costs to a delinquent debt owed to the Federal Government by the Service Provider pursuant to the Debt Collection Improvement Act of 1982, as amended.

Article 16. Transportation

A. All transportation of ICE detainees shall be conducted in accordance with the ICE 2011 PBNDS. Furthermore, except in emergency situations, a single officer may not transport a single detainee of the opposite gender and if there is an expectation that a pat search will occur during transport, an officer of the same gender as the detainee(s) must be present.

C. The Service Provider personnel provided for the above services shall be of the same qualifications, receive the same training, complete the same security clearances, and wear the same uniforms as those Service Provider personnel provided in the other areas of this Agreement. Transportation officers shall have the required state licenses for commercial drivers with the proper endorsement limited to vehicles with Automatic Transmission and the state Department of Motor Vehicles (DMV) (or Motor Vehicles Department (MVD)) Medical Certification.

D. Transport/Escort/Stationary Services Rate: The Service Provider agrees, upon request of ICE in whose custody an ICE detainee is held, to provide all such ground transportation/escort/stationary services as may be required to transport detainees housed at the facility securely, in a timely manner, to locations as directed by the ICE COR or designated ICE official. At least two (2) qualified law enforcement or correctional

Mileage From FACILITY	Locations	City	Frequency
REDACTED			

Article 17. Guard Services

A. The Service Provider agrees to provide stationary guard services, at a separately agreed hourly rate, on demand by the COR and shall include, but not limited to, escorting and guarding detainees to medical or doctor's appointments, hearings, ICE interviews, and any other remote location requested by the COR. Qualified detention officer personnel employed by the Service Provider under its policies, procedures, and practices will perform such services. The Service Provider agrees to augment such practices as may be requested by CO or COR to enhance specific requirements for security, detainee monitoring, visitation, and contraband control. Public contact is prohibited unless authorized in advance by the COR.

REDACTED

C. The itemized monthly invoice for such stationary guard services shall state the number of hours being billed, the duration of the billing (times and dates) and the names of the detainees that were guarded. Such services shall be denoted as a separate item on submitted invoices. ICE agrees to reimburse the Service Provider for actual stationary guard services provided during the invoiced period.

Article 18. Contracting Officer's Representative (COR)

A. The COR will be designated by the Contracting Officer. When and if the COR duties are reassigned, an administrative modification will be issued to reflect the changes. This designation does not include authority to sign contractual documents or to otherwise

commit to, or issue changes, which could affect the price, quantity, or performance of this Agreement.

B. Should the Service Provider believe it has received direction that is not within the scope of the agreement; the Service Provider shall not proceed with any portion that is not within the scope of the agreement without first contacting the Contracting Officer. The Service Provider shall continue performance of efforts that are deemed within the scope.

Article 19. Labor Standards and Wage Determination

A. The Service Contract Act, 41 U.S.C. 351 et seq., Title 29, Part 4 Labor Standards for Federal Service Contracts, is hereby incorporated as Attachment 2. These standards and provisions are included in every contract and IGSA entered into by the United States or the District of Columbia, in excess of $2,500, or in an indefinite amount, the principal purpose of which is to furnish services through the use of service employees.

B. Wage Determination: Each service employee employed in the performance of this Agreement shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this Agreement. (See Attachment 3 - Wage Determination)

C. FAR 52.222-43 Fair Labor Standards Act and the Service Contract Act-Price Adjustment (Multiyear and Option Contracts) is incorporated by reference.

Article 20. Notification and Public Disclosures

A. Information obtained or developed as a result of this IGSA is under the control of ICE and is subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations, and executive orders or as ordered by a court. Insofar as any documents created by the Service Provider contain information developed or obtained as a result of this IGSA, such documents shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations, and executive orders or as ordered by a court. To the extent the Service Provider intends to release the IGSA or any information relating to, or exchanged under, this IGSA, the Service Provider agrees to coordinate with the ICE Contracting Officer prior to such release. The Service Provider may, at its discretion, communicate the substance of this IGSA when requested. ICE understands that this IGSA will become a public document when presented to the Service Provider's governing body for approval.

B. The CO shall be notified in writing of all litigation pertaining to this IGSA and provided copies of any pleadings filed or said litigation within five working days of receipt. The Service Provider shall cooperate with Government legal staff and/or the United States Attorney regarding any requests pertaining to federal or Service Provider litigation.

(4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;
(5) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
(6) Suspension or debarment.

(f) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.

(g) *Mitigating Factor*. The Contracting Officer may consider whether the Contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining remedies. Additional information about Trafficking in Persons and examples of awareness programs can be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at http://www.state.gov/g/tip.

Article 28. Order of Precedence

Should there be a conflict between the 2011 PBNDS and other any other term and/or condition of the IGSA, the Service Provider shall contact the Contracting Officer for clarification.

Article 29. Reporting Executive Compensation and First-Tier Subcontract Awards

a) *Definitions*. As used in this article:

"Executive" means officers, managing partners, or any other employees in management positions.

"First-tier subcontract" means a subcontract awarded directly by the Contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the Contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a Contractor's general and administrative expenses or indirect costs.

"Months of award" means the month in which a contract is signed by the Contracting Officer or the month in which a first-tier subcontract is signed by the Contractor.

"Total compensation" means the cash and noncash dollar value earned by the executive during the Contractor's preceding fiscal year and includes the following (for more information see 17 CFR 229.402(c)(2)):

(1) *Salary and bonus*.

PBNDS 2011 Optimal Provisions

ADMISSION AND RELEASE

Transgender Searches:

- "Whenever possible, medical personnel shall be present to observe the strip search of a transgender detainee."

LAW LIBRARIES AND LEGAL MATERIAL

Minimum Hours for Law Library Access:

- "When requested and where resources permit, facilities shall provide detainees meaningful access to law libraries, legal materials, and related materials on a regular schedule and no less than 15 hours per week."
  (*2011 general requirement:* 5 hours per week)
  [Note that this optimal provision only requires the extra law library time for those that request it, and doesn't require expanded law library resources on the assumption that all detainees would make use of the extra time]

NCCHC COMPLIANCE

Medical Care (Standard 4.3):

- "Medical facilities within the detention facility shall achieve and maintain current accreditation with the standards of the National Commission on Correctional Health Care (NCCHC), and shall maintain compliance with those standards."

Significant Self-Harm and Suicide Prevention and Intervention (Standard 4.6):

- "The facility shall be in compliance with standards set by the National Commission on Correctional Health Care (NCCHC) in its provision of preventive supervision, treatment, and therapeutic follow-up for clinically suicidal detainees or detainees at risk for significant self-harm."

Terminal Illness, Advance Directives, and Death (Standard 4.7):

- "The facility shall be in compliance with standards set by the National Commission on Correctional Health Care (NCCHC) in its provision of medical care to terminally ill detainees."

Medical Care (Women) (Standard 4.4):

- "The facility's provision of gynecological and obstetrical health care shall be in compliance with standards set by the National Commission on Correctional Health Care (NCCHC)."

MEDICAL CARE

Tele-Medicine:

- "Adequate space and staffing for the use of services of the ICE Tele-Health Systems, inclusive of tele-radiology (ITSP) and tele-medicine, shall be provided."
- "The facility, when equipped with appropriate technology and adequate space, shall provide for the use of services of the ICE Tele-Health Systems, inclusive of tele-radiology (ITSP), tele-psychiatry and tele-medicine."

RECREATION

Minimum Recreation for General Populations:

- "Detainees shall have at least four hours a day access, seven days a week, to outdoor recreation, weather and scheduling permitted. Outdoor recreation shall support leisure activities, outdoor sports and exercise as referenced and defined by the National Commission on Correctional Health Care Standards, provided outside the confines of the housing structure and/or other solid enclosures."

- "Detainees in the general population shall have access at least four hours a day, seven days a week to outdoor recreation, weather and scheduling permitted. Daily indoor recreation shall also be available. During inclement weather, detainees shall have access to indoor recreational opportunities with access to natural light."
  (*2011 general requirement:* "Detainees shall have access to . . . one hour daily of physical exercise outside the living area, and outdoors when practicable. If outdoor recreation is available at the facility, each detainee in general population shall have access for at least one hour, seven days a week, at a reasonable time of day, weather permitting")

Minimum Recreation for a Special Management Unit (SMU):

- Administrative SMU: "Facilities operating at the optimal level will offer detainees at least two hours of recreation or exercise per day, seven days a week."
  (*2011 general requirement:* one hour of recreation per day, at least seven days per week)
- Disciplinary SMU: "Facilities operating at the optimal level will offer detainees at least one hour of recreation or exercise per day, seven days a week."
  (*2011 general requirement:* one hour of recreation per day, at least five days per week)

Other Programs and Activities:

- "Facilities operating at the optimal level shall offer access to reading materials, through libraries with regular hours, book carts or other means. Reading materials in English, Spanish and, if practicable, other languages, should be made available."
- "Facilities shall offer other programmatic activities, such as:
  1. educational classes or speakers;
  2. sobriety programs such as alcoholics anonymous; and
  3. other organized activities or recreational programs."

SPECIAL MANAGEMENT UNITS

Pre-Placement Medical Evaluation:

- "Detainees must be evaluated by a medical professional prior to being placed in an SMU."

TELEPHONE ACCESS

Minimum Number of Telephones:

- "Facilities shall be operating at the optimal level when at least one telephone is provided for every ten (10) detainees."
  (*2011 general requirement:* at least one operable telephone for every 25 detainees)

Telephone Access for Detainees with Disabilities:

- "Consistent with the order and safety of the facility, the facility may allow for use of other equipment such as video relay and video phones for detainees who are deaf or hard of hearing. Facilities shall permit detainees with disabilities the opportunity to submit requests for the auxiliary aid of their preference."

QUALITY ASSURANCE SURVEILLANCE PLAN

1. INTRODUCTION

ICE's Quality Assurance Surveillance Plan (QASP) is based on the premise that the Service Provider, and not the Government, is responsible for the day-to-day operation of the Facility and all the management and quality control actions required to meet the terms of the Agreement. The role of the Government in quality assurance is to ensure performance standards are achieved and maintained. The Service Provider shall develop a comprehensive program of inspections and monitoring actions and document its approach in a Quality Control Plan (QCP). The Service Provider's QCP, upon approval by the Government, will be made a part of the resultant Agreement.

This QASP is designed to provide an effective surveillance method to monitor the Service Provider's performance relative to the requirements listed in the Agreement. The QASP illustrates the systematic method the Government (or its designated representative) will use to evaluate the services the Service Provider is required to furnish.

This QASP is based on the premise the Government will validate that the Service Provider is complying with ERO-mandated quality standards in operating and maintaining detention facilities. Performance standards address all facets of detainee handling, including safety, health, legal rights, facility and records management, etc. Good management by the Service Provider and use of an approved QCP will ensure that the Facility is operating within acceptable quality levels.

2. DEFINITIONS

Performance Requirements Summary (Attachment A): The Performance Requirements Summary (PRS) communicates what the Government intends to qualitatively inspect. The PRS is based on the American Correctional Association (ACA) Standards for Adult Local Detention Facilities (ALDF) and ICE 2011 Performance Based National Detention Standards (PBNDS). The PRS identifies performance standards grouped into nine functional areas, and quality levels essential for successful performance of each requirement. The PRS is used by ICE when conducting quality assurance surveillance to guide them through the inspection and review processes.

Functional Area: A logical grouping of performance standards.

Contracting Officer's Technical Representative (COTR): The COTR interacts with the Service Provider to inspect and accept services/work performed in accordance with the technical standards prescribed in the Agreement. The Contracting Officer issues a written memorandum that appoints the COTR. Other individuals may be designated to assist in the inspection and quality assurance surveillance activities.

Performance Standards: The performance standards are established in the ERO ICE 2011 PBNDS at http://www.ice.gov/detention-standards/2011 as well as the ACA standards for ALDF. Other standards may also be defined in the Agreement.

Measures: The method for evaluating compliance with the standards.

Acceptable Quality Level: The minimum level of quality that will be accepted by ICE to meet the performance standard.

Withholding: Amount of monthly invoice payment withheld pending correction of a deficiency. See Attachment A for information on the percentages of an invoice amount that may be withheld for each functional area. Funds withheld from payment are recoverable (See Sections 7 and 8) if the COTR and Contracting Officer confirm resolution or correction, and should be included in the next month's invoice.

Deduction: Funds may be deducted from a monthly invoice for an egregious act or event, or if the same deficiency continues to occur. The Service Provider will be notified immediately if such a situation arises. The Contracting Officer in consultation with the ERO will determine the amount of the deduction. Amounts deducted are not recoverable.

4. QUALITY CONTROL PLAN

The Service Provider shall develop, implement, and maintain a Quality Control Plan (QCP) that illustrates the methods it will use to review its performance to ensure it conforms to the performance requirements. (See Attachment A for a summary list of performance requirements.) Such reviews shall be performed by the Service Provider to validate its operations, and assure ICE that the services meet the performance standards.

The Service Provider's QCP shall include monitoring methods that ensure and demonstrate its compliance with the performance standards. This includes inspection methods and schedules that are consistent with the regular reviews conducted by ERO. The reports and other results generated by the Service Provider's QCP activities should be provided to the COTR as requested.

The frequency and type of the Service Provider's reviews should be consistent with what is necessary in order to ensure compliance with the performance standards.

The Service Provider is encouraged not to limit its inspection to only the processes outlined in the 2011 PBNDS; however, certain key documents shall be produced by the Service Provider to ensure that the services meet the performance standards. Some of the documentation that shall be generated and made available to the COTR for inspection is listed below. The list is intended as illustrative and is not all-inclusive. The Service Provider shall develop and implement a program that addresses the specific requirement of each standard and the means it will use to document compliance.

- Written policies and procedures to implement and assess operational requirements of the standard
- Documentation and record keeping to ensure ongoing operational compliance with the standards (e.g.; inventories, logbooks, register of receipts, reports, etc.)
- Staff training records
- Contract discrepancy reports (CDRs)
- Investigative reports

- Medical records
- Records of investigative actions taken
- Equipment inspections
- System tests and evaluation

5. METHODS OF SURVEILLANCE

ICE will monitor the Service Provider's compliance with the Performance Standards using a variety of methods. All facilities will be subject to a full annual inspection, which will include a review of the Service Provider's QCP activities. In addition, ICE may conduct additional routine, follow-up, or unscheduled ad hoc inspections as necessary (for instance, as a result of unusual incidents or data reflected in routine monitoring). ICE may also maintain an on-site presence in some facilities in order to conduct more regular or frequent monitoring. Inspections and monitoring may involve direct observation of facility conditions and operations, review of documentation (including QCP reports), and/or interviews of facility personnel and detainees.

5.1 Documentation Requirements: The Service Provider shall develop and maintain all documentation as prescribed in the PBNDS (e.g., post logs, policies, and records of corrective actions). In addition to the documentation prescribed by the standards, the Service Provider shall also develop and maintain documentation that demonstrates the results of its own inspections as prescribed in its QCP. The Government may review 100% of the documents, or a representative sample, at any point during the period of performance.

6. FUNCTIONAL PERFORMANCE AREAS AND STANDARDS

To facilitate the performance review process, the required performance standards are organized into nine functional areas. Each functional area represents a proportionate share (i.e., weight) of the monthly invoice amount payable to the Service Provider based on meeting the performance standards. Payment withholdings and deductions will be based on these percentages and weights applied to the overall monthly invoice.

ICE may, consistent with the scope the Agreement, unilaterally change the functional areas and associated standards affiliated with a specific functional area. The Contracting Officer will notify the Service Provider at least 30 calendar days in advance of implementation of the new standard(s). If the Service Provider is not provided with the notification, adjustment to the new standard shall be made within 30 calendar days after notification. If any change affects pricing, the Service Provider may submit a request for equitable price adjustment in accordance with the "Changes" clause. ICE reserves the right to develop and implement new inspection techniques and instructions at any time during performance without notice to the Service Provider, so long as the standards are not more stringent than those being replaced.

7. FAILURE TO MEET PERFORMANCE STANDARDS

Performance of services in conformance with the PRS standards is essential for the Service Provider to receive full payment as identified in the Agreement. The Contracting Officer may take withholdings or deductions against the monthly invoices for unsatisfactory performance documented through surveillance of the Service Provider's activities gained through site inspections, reviews of documentation (including monthly QCP reports), interviews and other

feedback. As a result of its surveillance, the Service Provider will be assigned the following rating relative to each performance standard:

Rating	Description
Acceptable	Based on the measures, the performance standard is demonstrated.
Deficient	Based on the measures, compliance with most of the attributes of the performance standard is demonstrated or observed with some area(s) needing improvement. There are no critical areas of unacceptable performance
At-Risk	Based on the performance measures, the majority of a performance standard's attributes are not met.

Using the above standards as a guide, the Contracting Officer will implement adjustments to the Service Provider's monthly invoice as prescribed in Attachment A.

Rather than withholding funds until a deficiency is corrected, there may be times when an event or a deficiency is so egregious that the Government ***deducts*** (vs. "withholds") amounts from the Service Provider's monthly invoice. This may happen when a significant event occurs, when a particular deficiency is noted multiple times without correction, or when the Service Provider has failed to take timely action on a deficiency about which he was properly and timely notified. The amount deducted will be consistent with the relative weight of the functional performance area where the deficiency was noted. The deduction may be a one-time event, or may continue until the Service Provider has either corrected the deficiency, or made substantial progress in the correction.

Further, a deficiency found in one functional area may tie into another. If a detainee escaped, for example, a deficiency would be noted in "Security," but may also relate to a deficiency in the area of "Administration and Management." In no event will the withhold or deduction exceed 100% of the invoice amount.

8. NOTIFICATIONS

(a) Based on the inspection of the Service Provider's performance, the COTR will document instances of deficient or at-risk performance (e.g., noncompliance with the standard) using the CDR located at Attachment B. To the extent practicable, issues should be resolved informally, with the COTR and Service Provider working together. When documentation of an issue or deficiency is required, the procedures set forth in this section will be followed.

(b) When a CDR is required to document performance issues, it will be submitted to the Service Provider with a date when a response is due. Upon receipt of a CDR, the Service Provider shall immediately assess the situation and either correct the deficiency as quickly as possible or prepare a corrective action plan. In either event, the Service Provider shall return the CDR with the action planned or taken noted. After the COTR reviews the Service Provider's response to the CDR including its planned remedy or corrective action taken, the COTR will either accept the plan or correction or reject the correction or plan for revision and provide an

explanation. This process should take no more than one week. The CDR shall not be used as a substitute for quality control by the Service Provider.

(c) The COTR, in addition to any other designated ICE official, shall be notified immediately in the event of all emergencies. Emergencies include, but are not limited to the following: activation of disturbance control team(s); disturbances (including gang activities, group demonstrations, food boycotts, work strikes, work-place violence, civil disturbances, or protests); staff use of force including use of lethal and less-lethal force (includes detainees in restraints more than eight hours); assaults on staff or detainees resulting in injuries requiring medical attention (does not include routine medical evaluation after the incident); fights resulting in injuries requiring medical attention; fires; full or partial lock down of the Facility; escape; weapons discharge; suicide attempts; deaths; declared or non-declared hunger strikes; adverse incidents that attract unusual interest or significant publicity; adverse weather (e.g., hurricanes, floods, ice or snow storms, heat waves, tornadoes); fence damage; power outages; bomb threats; significant environmental problems that impact the Facility operations; transportation accidents resulting in injuries, death or property damage; and sexual assaults. Note that in an emergency situation, a CDR may not be issued until an investigation has been completed.

(d) If the COTR concludes that the deficient or at-risk performance warrants a withholding or deduction, the COTR will include the CDR in its monthly report, with a copy to the Contracting Officer. The CDR will be accompanied by the COTR's investigation report and written recommendation for any withholding. The Contracting Officer will consider the COTR's recommendation and forward the CDR along with any relevant supporting information to the Service Provider in order to confirm or further discuss the prospective cure, including the Government's proposed course of action. As described in section 7 above, portions of the monthly invoice amount may be withheld until such time as the corrective action is completed, ***or*** a deduction may be taken.

(e) Following receipt of the Service Provider's notification that the correction has been made, the COTR may re-inspect the Facility. Based upon the COTR's findings, he or she will recommend that the Contracting Officer continue to withhold a proportionate share of the payment until the correction is made, or accept the correction as final and release the full amount withheld for that issue.

(f) If funds have been withheld and either the Government or the Service Provider terminates the Agreement, those funds will not be released. The Service Provider may only receive withheld payments upon successful correction of an instance of non-compliance. Further, the Service Provider is not relieved of full performance of the required services hereunder; the Agreement may be terminated upon adequate notice from the Government based upon any one instance, or failure to remedy deficient performance, even if a deduction was previously taken for any inadequate performance.

(g) The COTR will maintain a record of all open and resolved CDRs.

9. DETAINEE OR MEMBER OF THE PUBLIC COMPLAINTS

The detainee and the public are the ultimate recipients of the services identified in this Agreement. Any complaints made known to the COTR will be logged and forwarded to the Service Provider for remedy. Upon notification, the Service Provider shall be given a pre-specified number of hours after verbal notification from the COTR to address the issue. The Service Provider shall submit documentation to the COTR regarding the actions taken to remedy the situation. If the complaint is found to be invalid, the Service Provider shall document its findings and notify the COTR.

10. ATTACHMENTS

A. Performance Requirements Summary

B. Contract Discrepancy Report

Attachment A – Performance Requirements Summary

FUNCTIONAL AREA/ WEIGHT	PERFORMANCE STANDARD (PBNDS 2011)	WITHHOLDING CRITERIA
Safety (20%) Addresses a safe work environment for staff, volunteers, contractors and detainees	**PBNDS References: Part 1 - SAFETY** 1.1 Emergency Plans; 1.2 Environmental Health and Safety; 1.3 Transportation (by Land).	A Contract Discrepancy Report that cites violations of cited PBNDS and PWS (contract) sections that provide a safe work environment for staff, volunteers, contractors and detainees, permits the Contract Officer to withhold or deduct up to **20%** of a month invoice until the Contract Officer determines there is full compliance with the standard or section.
Security (20%) Addresses protection of the community, staff, contractors, volunteers and detainees from harm	**PBNDS References: Part 2 - SECURITY** 2.1 Admission and Release; 2.2 Classification System; 2.3 Contraband; 2.4 Facility Security and Control; 2.5 Funds and Personal Property; 2.6 Hold Rooms in Detention Facilities; 2.7 Key and Lock Control; 2.8 Population Counts; 2.9 Post Orders; 2.10 Searches of Detainees; 2.11 Sexual Abuse and Assault Prevention and Intervention; 2.12 Special Management Units; 2.13 Staff-Detainee Communication; 2.14 Tool Control; 2.15 Use of Force and Restraints.	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that protect the community, staff, contractors, volunteers, and detainees from harm, permits the Contract Officer to withhold or deduct up to **20%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.
Order (10%) Addresses contractor responsibility to maintain an orderly environment with clear expectations of behavior and systems of accountability	**PBNDS Reference: Part 3 - ORDER** 3.1 Disciplinary System.	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that maintain an orderly environment with clear expectations of behavior and systems of accountability permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard of section.
Care (20%) Addresses contractor responsibility to provide for the basic needs and personal care of detainees	**PBNDS References: Part 4 - CARE** 4.1 Food Service; 4.2 Hunger Strikes; 4.3 Medical Care; 4.4 Personal Hygiene; 4.5 Suicide Prevention and Intervention; 4.6 Terminal Illness, Advanced Directives, and Death.	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that provide for the basic needs and personal care of detainees, permits the Contract Officer to withhold or deduct up to **20%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.
Activities (10%) Addresses contractor responsibilities to reduce the negative effects of confinement	**PBNDS References: Part 5 - ACTIVITIES** 5.1 Correspondence and Other Mail; 5.2 Escorted Trips for Non-Medical Emergencies; 5.3 Marriage Requests; 5.4 Recreation; 5.5 Religious Practices; 5.6 Telephone Access; 5.7 Visitation; 5.8 Voluntary Work Program.	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that reduce the negative effects of confinement permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.
Justice (10%) Addresses contractor responsibilities to treat detainees fairly and respect their legal rights	**PBNDS References: Part 6 - JUSTICE** 6.1 Detainee Handbook; 6.2 Grievance System; 6.3 Law Libraries and Legal Materials; 6.4 Legal Rights Group Presentations.	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that treat detainees fairly and respect their legal rights, permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.

Attachment A – Performance Requirements Summary

FUNCTIONAL AREA/ WEIGHT	PERFORMANCE STANDARD (PBNDS 2011)	WITHHOLDING CRITERIA
Administration and Management (10%) Addresses contractor responsibilities to administer and manage the facility in a professional and responsible manner consistent with legal requirements	**PBNDS References: Part 7 - -ADMIN & MANAGEMENT** 7.1 Detention Files; 7.2 News Media Interviews and Tours; 7.3 Staff Training; 7.4 Transfer of Detainees; **Accommodations for the Disabled, 4-ALDF-6B-04, 4-ALDF-6B-07**	A Contract Discrepancy Report that cites violations of PBNDS and PWS (contract) sections that require the Contractor's administration and management of the facility in a professional and responsible manner consistent with legal requirements, permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.
Workforce Integrity (10%) Addresses the adequacy of the detention/correctional officer hiring process, staff training and licensing/certification and adequacy of systems	**Staff Background and Reference Checks (Contract) 4-ALDF-7B-03** **Staff Misconduct 4-ALDF-7B-01** **Staffing Pattern Compliance within 10% of required (Contract) 4-ALDF-2A-14** **Staff Training, Licensing, and Credentialing (Contract) 4-ALDF-4D-05, 4-ALDF-7B-05, 4-ALDF-7B-08**	A Contract Discrepancy Report that cites violations of the ALDF Standards associated with Workforce Integrity and PWS (contract) sections permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.
Detainee Discrimination (10%) Addresses the adequacy of policies and procedures to prevent discrimination against detainees based on their gender, race, religion, national origin, or disability	**Discrimination Prevention 4-ALDF-6B-02-03**	A Contract Discrepancy Report that cites violations of the ALDF Standards associated with Detainee Discrimination and PWS (contract) sections permits the Contract Officer to withhold or deduct up to **10%** of a monthly invoice until the Contract Officer determines there is full compliance with the standard or section.

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Performance Work Statement

I. INTRODUCTION

A. Background

Enforcement and Removal Operations (ERO), a component of U.S. Immigration and Customs Enforcement (ICE), maintains custody of one of the most highly transient and diverse populations of any detention system in the nation. These detainees are housed in authorized facilities nationwide including local facilities operating under Inter-Governmental Service Agreements (IGSAs), private Contract Detention Facilities (CDFs), and ICE-owned Service Processing Centers (SPC).

A key goal of Immigration Detention Reform is to create a civil detention system that is not penal in nature and serves the needs of ICE to provide safe and secure conditions based on characteristics of a diverse population including an individual's perceived threat to the community, risk of flight, type and status of immigration proceeding, community ties, and medical and mental health issues.

B. Scope of Work Performance

This Performance Work Statement (PWS) sets forth the Agreement's performance requirements for IGSA-provided detention facilities and services for ICE detainees.

The Facility's operation shall reflect the 2011 PBNDS Expected Outcomes and Practices as well as the Optimal provisions listed in in Attachment1 Where minimum requirements are expressed, innovation is encouraged to further the goals of detention reform.

C. Explanation of Terms/Acronyms

1. ADMINISTRATIVE CONTRACTING OFFICER (ACO): ICE employee responsible for contract compliance, contract administration, cost control, and reviewing Contracting Officer's Representative's (COR) assessment of Service Provider's performance.

2. ADULT LOCAL DETENTION FACILITY (ALDF): A facility which detains persons over the age of 18.

3. ALIEN: Any person who is not a citizen or national of the United States.

4. BED DAY: Per diem "detainee day" or "man-day" means day in or day out and all days in between. The Service Provider may charge for day of arrival or day of departure, but not both.

II. GENERAL INFORMATION

A. Introduction

Unless otherwise specified, *all* plans, policies, and procedures shall be developed by the Service Provider and submitted in writing to the CO for review **and concurrence** prior to receiving detainees for housing. Once concurrence has been granted, these plans, policies, and procedures shall not be modified without the prior written acknowledgment of the CO. The Service Provider does not have a right of refusal and shall take all referrals from ICE, as long as the individuals have been properly classified to be housed at this facility. The Service Provider is prohibited from constructing or making modifications to or adding any additional bed space or facilities at the facility location without the prior written approval of the CO.

B. General

The Service Provider shall abide by all rules and regulations in the following sources:

1. Post Orders

2. American Correctional Association (ACA) Standards for Adult Local Detention Facilities (most current edition) and the most recent copies of the supplements as they are issued. Copies are obtainable for purchase through the Internet website. HTTP://www.aca.org/storeibookstore/.

3. Officers' Handbook (M-68)

4. The 2011 Performance Based National Detention Standards (PBNDS). CCA may submit requests to waive compliance with PBNDS optimal standards within 180 days of the Agreement effective date. (Note: The provisions of the PBNDS 2011 should be interpreted as minimum requirements. Facilities are encouraged to design and operate the facility to provide the least restrictive conditions appropriate to maintain the security and safety of the staff and detainees.)

5. Federal, state, and local laws governing use of firearms, fire safety and environmental health.

6.

All services must comply with this agreement and all applicable federal, state, and local laws and standards. Should a conflict exist between any of these laws or standards or regulations, the most stringent shall apply. If the Service Provider is unable to determine which law or standard is more stringent, the CO shall determine the appropriate standard.

V. REQUIRED SERVICES - ADMINISTRATION AND MANAGEMENT

A. Manage Information System for Collecting, Retrieving, Storing, and Reporting Detainee Detention

All detainee files are to be prepared, maintained, retired, and disposed of in accordance with the 2011 PBNDS. Policy and procedures shall be developed to ensure the confidentiality and security of all detainee files. Information from a detention file will be released to an outside third party only with the detainee's signed release-of-information consent form. Any release of information will be in accordance with applicable Federal and state regulations.

B. Manage the Receiving and Discharge of Detainees

In accordance with the 2011 PBNDS, the Service Provider will provide for the admitting and releasing of detainees to protect the health, safety, and welfare of each individual. During the admissions process, detainees undergo screening for medical purposes, have their files reviewed to ensure they can be housed at the facility, submit to a standard body search, and are personally observed and certified regarding the examination, categorization, inventorying, and safeguarding of all personal belongings. This shall include fingerprinting of detainees.

The Service Provider shall comply with the ICE policy on Admission and Release when entering detainee admission and release data. ICE detainees shall be fingerprinted in accordance with the ICE policy on Admissions Documentation. The intake process shall include, at a minimum, a medical and social screening prior to detainee release into the general population.

This facility is designed for Level I, II, and III detainees that include non-criminals as well as those with criminal records.

Detainees will have access to a minimum of one free telephone call during the admission process and the release process.

C. Manage and Account for Detainee Assets (funds, property)

The Service Provider will provide for the control and safeguarding of detainees' personal property. This will include: the secure storage and return of funds, valuables, baggage, and other personal property; a procedure for documentation and receipting of surrendered property; and the initial and regularly scheduled inventories of all funds, valuables, and other property.

The Service Provider shall have written standard procedures for inventory and receipt of detainee funds and valuables that adheres to the requirements of ICE policy on Funds and Personal Property; and Detention and Removal Operations Policy and Procedure Manual (DROPPM) Update: Chapter 30: Detainee Property Management.

Written procedures shall be established for returning funds, valuables, and personal property to a detainee being transferred or released that adheres to the requirements of ICE policy. The Service Provider shall ensure that all detainees who are scheduled for either transfer or release are given all funds (in cash) immediately prior to leaving the facility. Confiscated foreign currency funds are to be returned to the detainee.

D. Securely Operate the Facility

Policy and procedures for the maintenance and security of keys and locking mechanisms shall be developed. The procedures shall include, but are not limited to: method of inspection to expose compromised locks or locking mechanisms; method of replacement for all damaged keys and/or locks; a preventive maintenance schedule for servicing locks and locking mechanisms and method of logging all work performed on locks and locking mechanisms; policy for restricting security keys from 24 hour issue or removal from the institution; and method of issuing emergency keys. Staff responsible for lock maintenance shall receive training and be certified from a Government approved training program (or equivalent) specializing in the operation of locks and locking mechanisms. The Service Provider shall provide constant unarmed perimeter surveillance of the facility. Surveillance may be provided via a minimum of one motorized security patrol.

The Service Provider shall develop policies and procedures regarding detainee use of those classified controlled tools and equipment most likely to be used in an escape or as a weapon. Further, the Service Provider shall ensure that detainee usage of those classified controlled tools and equipment is only under direct Service Provider staff supervision.

E. Enforce the Detainee Disciplinary Policy

The Service Provider shall comply with the 2011 PBNDS disciplinary policy. Facility authorities may take disciplinary action against any detainee who is not in compliance with the rules and procedures of the facility.

F. Administrative Segregation Policy

Placements in administration segregation for purposes of protection custody should only be done for short duration. Use of administrative segregation to protect vulnerable populations shall be restricted to those instances where reasonable efforts have been made to provide appropriate housing and shall be made for the least amount of time practicable, and when no other viable housing options exist, and as a last resort. Detainees who have been placed in administrative segregation for protective custody shall have access to programs, services, visitation, counsel and other services to the maximum extent possible.

G. Maintain Detainee Accountability

Population counts will be conducted in accordance with the 2011 PBNDS. All counts shall be documented in separate logs maintained in the applicable locations where detainees are housed, the control center and shift supervisor's office and shall be maintained for a minimum of 30 days. Count records must be available for review and secured away from the detainee population.

H. Collect and Disseminate Intelligence Information

Policy and procedures for collecting, analyzing, and disseminating intelligence information regarding issues affecting safety, security, and the orderly running of the facility shall be developed. This information should include, but not be limited to: gang affiliations; domestic terrorist groups; tracking of detainees having advanced skills in areas of concern (locksmiths, gunsmiths, explosives, and computers, etc.); narcotics trafficking; mail and correspondences; detainee financial information; detainee telephone calls; visiting room activity; and actions of high profile detainees. The Service Provider shall share all intelligence information with the ICE Intelligence Office.

I. Provide Security Inspection System

The Service Provider will develop and maintain a security inspection system with the aim of controlling the introduction of contraband into the facility, ensure facility safety, security and good order, prevent escapes, maintain sanitary standards, and eliminate fire and safety hazards. The Service Provider's inspections program will meet the requirements of the 2011 PBNDS for Security Inspections.

The Service Provider shall report all criminal activity related to the performance of this contract to the appropriate law enforcement investigative agency. The Government may investigate any incident pertaining to performance of this contract. The Service Provider shall cooperate with the Government on all such investigations. The Service Provider shall immediately report all serious incidents or criminal activity to the COR Serious incidents include, but are not limited to the following: activation of disturbance control team(s); disturbances (including gang activities, group demonstrations, food boycotts, work strikes, work place violence, civil disturbances/protests); staff uses of force including use of lethal and less lethal force (includes detainees in restraints more than eight hours); assaults on staff/detainees resulting in injuries that require medical attention (does not include routine medical evaluation after the incident); fires; fights resulting in injuries requiring medical attention; full or partial lock-down of the facility; escape; weapons discharge; suicide attempts; deaths; declared or non-declared hunger strikes; adverse incidents that attract unusual interest or significant publicity; adverse weather; fence damage; power outages; bomb threats; high profile detainee cases admitted to a hospital; significant environmental problems that impact the facility operations; transportation accidents resulting in injuries, death or property damage; and sexual assaults. Pursuant to ICE

instructions, the Service Provider shall counteract civil disturbances, attempts to commit espionage or sabotage, and other acts that adversely affect the normal site conditions, the security and safety of personnel, property, detainees, and the general public.

J. Maintain Institutional Emergency Readiness

The Service Provider shall submit an institutional emergency plan that will be operational prior to issuance of the NTP. The plan shall receive the concurrence of the COR prior to implementation and shall not be modified without the further written concurrence of the CO. The Service Provider shall have written agreements with appropriate state and local authorities that will allow the Service Provider to make requests for assistance in the event of any emergency incident that would adversely affect the community. Likewise, the Service Provider shall have in place, an internal corporate nation-wide staff contingency plan consisting of employees who possess the same expertise and skills required of staff working directly on this contract. At the discretion of ICE, these employees would be required to respond to an institutional emergency at the contracted facility if deemed necessary. The emergency plans shall include provisions for two or more disturbance control teams. Protective clothing and equipment for each team member and 30 percent of all additional facility staff members shall be provided by the Service Provider, and maintained in a secure location outside the secure perimeter of the facility.

Any decision by ICE or other federal agencies to provide and/or direct emergency assistance will be at the discretion of the Government. The Service Provider shall reimburse the Government for any and all expenses incurred in providing such assistance.

Attempts to apprehend any escapee(s) shall be in accordance with the Emergency Plan, which shall comply with the 2011 PBNDS regarding Emergency Plans.

The Service Provider shall submit to the COR a proposed inventory of intervention equipment (e.g., weapons, munitions, chemical agents) intended for use during performance of this contract. The COR, prior to issuance of the NTP, shall provide concurrence of the intervention equipment. The approved intervention equipment inventory shall not be modified without prior written concurrence of the CO.

The Service Provider shall obtain the appropriate authority from state or local law enforcement agencies to use force as necessary to maintain the security of the facility. The use of force by the Service Provider shall at all times be consistent with all applicable policies of the 2011 PBNDS on Use of Force.

K. Manage Computer Equipment and Services in Accordance with all Operational Security Requirements

The Service Provider must comply with all federal security and privacy laws and regulations established to protect federal systems and data. The Service Provider will inform all personnel of the confidential nature of ICE detainee information.

The Service Provider will restrict access of data information pertaining to ICE detainees to authorized employees with the appropriate clearance who require this information in the course of their official duties. In accordance with the Freedom of Information/Privacy Act (FOIAIP A), the Service Provider may not disclose information obtained pertaining to ICE detainees to a third party without written permission from the COR. The Service Provider is required to develop a procedural system to identify and record unauthorized access, or attempts to access ICE detainee information. The Service Provider will notify the COR and alternate COR within four hours of a security incident.

VI. FACILITY SECURITY AND CONTROL

A. Security and Control (General)

The Service Provider shall maintain a copy of facility post orders for employee review within the areas of assignment, and shall initiate responses to any incidents as outlined in the post orders. The Service Provider employees shall write reports of incidents as outlined in the post orders. The Service Provider shall operate and control all designated points of access and egress on the site; such as, detainee housing units, courtrooms, medical facilities, and hold rooms. The Service Provider shall inspect all packages carried in or out of site in accordance with ICE procedures. The Service Provider shall comply with ICE security plans.

The Service Provider shall comply with all the 2011 PBNDS pertaining to the security and control of the detention facilities. The Service Provider will adhere to local operating procedures within each facility.

B. Unauthorized Access

The Service Provider shall detect and detain persons attempting to gain unauthorized access to the site(s) identified in this contract.

C. Direct Supervision of Detainees

The Service Provider shall provide supervision of all detainees in all areas, including supervision in detainee housing and activity areas, to permit Detention Officers to hear and respond promptly to emergencies.

D. Logbooks

The Service Provider shall be responsible to complete and document in writing, for each shift, the following information in the logbooks:

1. Activities that have an impact on the detainee population (e.g., detainee counts, shakedowns, detainee movement in and out of the site, and escorts to and from court).
2. Shift activities (e.g., security checks, meals, recreation, religious services, property lockers, medical visits).
3. Entry and exit of persons other than detainees, ICE staff, or Service Provider Staff (e.g., attorneys and other visitors).
4. Fire drills and unusual occurrences.

S. Protection of Employees

The Service Provider shall develop plans that comply with ICE comprehensive plans and procedures to safeguard employees against exposure of blood borne pathogens. The ICE plan is based upon OSHA standards found in the Employee Occupational Safety and Health (EOSH) Manual. (For additional information, please see Occupational Exposure to Blood Bourne Pathogens, 29 CFR 1910.1030.)

T. Medical Requests

The Service Provider shall adhere to ICE policies and procedures regarding detainee medical requests. Please see http://www.ice.gov/doclibIPBNDS/pdf/medical_care.pdf to view the 2011 PBNDS on Medical Care. If a detainee requires emergency medical attention, the Detention Officer shall immediately notify his or her Supervisor via radio or telephone. The Service Provider's Supervisor will, in turn, notify the medical provider as well as the COR and alternate COR.

U. Emergency Medical Evacuation

The Service Provider shall develop and implement written policies and procedures that define emergency health care evacuation of detainees from within the facility.

V. Sanitation and Hygienic Living Conditions

The Service Provider shall comply with the requirements of the Occupational Safety and Health Act of 1970 and all codes and regulations associated with 29 CFR 1910 and 1926. The Service Provider shall comply with all applicable ICE, federal, state and local laws, statutes, regulations, and codes. In the event there is more than one reference to a safety, health, or environment requirement in an applicable, law, standard, code, regulation, or ICE policy, the most stringent requirement shall apply.

VII. MANAGE A DETAINEE WORK PROGRAM

A. General

It will be the sole responsibility of ICE to determine whether a detainee will be allowed to perform on voluntary work details and at what classification level. All detainees shall be searched when they are returned from work details. Detainees shall not be used to perform the responsibilities or duties of an employee of the Service Provider. Detainees shall not be used to perform work in areas where sensitive documents are maintained (designated ICE workspace). Custodial/janitorial services to be performed in designated ICE work space will be the responsibility of the Service Provider. Appropriate safety/protective clothing and equipment shall be provided to detainee workers as appropriate. Detainees shall not be assigned work that is considered hazardous or dangerous. This includes, but is not limited to, areas or assignments requiring great heights, extreme temperatures, use of toxic substances, unusual physical demands, and cleaning of medical areas.

VIII. HEALTH SERVICES

The Service Provider will provide all health and medical-related services for the facility, as previously described in this PWS.

A. Manage a Detainee Death in Accordance with the 2011 PBNDS on Terminal Illness, Advance Directives, and Death

The Service Provider shall fingerprint the deceased. Staff members performing the fingerprinting shall date and sign the fingerprint card to ensure that a positive identification has been made and file the card in the detainee's file..

If death is due to violence, accident surrounded by unusual or questionable circumstances, or is sudden and the deceased has not been under immediate medical supervision, the Service Provider shall notify the coroner of the local jurisdiction to request a review of the case, and if necessary, examination of the body.

The Service Provider shall establish coroner notification procedures outlining such issues as performance of an autopsy, which will perform the autopsy, obtaining state approved death certificates, and local transportation of the body. The Service Provider shall in cooperation with the Field Office representative, ensure the body is turned over to the designated family member, the nearest of kin or the Consular Officer of the detainee's country of legal residence.

IX. FOOD SERVICE

A. Manage Food Service Program in a Safe and Sanitary Environment

The Service Provider shall provide detainees with nutritious, adequately varied meals, prepared in a sanitary manner while identifying, developing, and managing resources to meet the operational needs of the food service program. The Service Provider shall identify, develop, and manage food service program policy, procedures, and practices in accordance with the provisions of the 2011 PBNDS on Food Service.

X. DETAINEE SERVICES AND PROGRAMS

A. Manage Multi-Denominational Religious Services Program

The Service Provider shall ensure detainees of different religious beliefs will be provided reasonable and equitable opportunity to practice their respective faiths. The religious services program will comply with all elements of the 2011 PBNDS on Religious Practices and relevant federal statutes.

B. Provide for a Detainee Recreation Program

The Service Provider shall develop and ensure adequate and meaningful recreation programs for detainees at the facility. In addition to the indoor and outdoor recreation areas, the facility shall provide several multi-purpose rooms that can be used for activities such as indoor table games, watch TV, read, and generally interact with other detainees in a relaxed setting.

Indoor and outdoor areas will offer recreational equipment to provide aerobic and strength conditioning. Outside recreation activities may include handball, volleyball, basketball, soccer, or other activities appropriate to the needs of the population. Subject to the security needs of the facility, and using the provisions of the PBNDS 2011 as a guide, detainees will be allowed ample access to the recreation areas within the facility's perimeter. Recreation time should be no less than as specified in the PBNDS 2011.

C. Manage and Maintain a Commissary

A commissary shall be operated by the Service Provider as a privilege to detainees who will have the opportunity to purchase from the commissary several times per week. These items will not include those items prohibited by the Warden/Facility Director. All items available at the commissary must be approved by the COR or alternate COR. The commissary inventory shall be provided to the COR upon request. The Service Provider may assess sales tax to the price of items, if state sales tax is applicable.

Revenues are to be maintained in a separate account and not commingled with any other funds. If funds are placed in an interest bearing account, the interest earned must be credited to the detainees. Any expenditure of funds from the account shall only be made with the approval of the Contracting Officer. Any revenues earned in excess of those needed for commissary operations shall be used solely to benefit detainees at the facility. Profits may also be used to offset commissary staff salaries. The Service Provider shall provide independent auditor certification of the funds to the COR every 90 days. At the end of the contract period, or as directed by the Contracting Officer, a check for any balance remaining in this account shall be made

payable to the *Treasury General Trust Fund* and given/transmitted to the Contracting Officer.

Detainees are permitted to receive funds from outside sources (i.e., from family, friends, bank accounts). Outside funds or those generated from work may be used to pay for products and services from the commissary.

D. Visitation

Visitation shall be provided within a designated area with hours of operation throughout the week consistent with the PBNDS 2011. The facility shall provide multi-purpose rooms for NGOs rights presentations [and EOIR LOP programs]. These rooms shall also be available for use by consular officials.

E. Law Library

The Service Provider shall provide secure space within the secure perimeter, either a dedicated room or a multipurpose room for computers, printers, books, and materials to provide a reading area - "Law Library" - in accordance with the 2011 PBNDS on the Access to Legal Materials.

F. Library

The Service Provider shall provide secure space within the secure perimeter, either a dedicated room or a multipurpose room for books and materials to provide a reading area and detainees will be permitted to take books back to their housing area consistent with safety and security requirements.

G. Barber Shop

A barber shop, designed and equipped in accordance with ICE standards, shall be made available to ICE detainees.

H. Language Access

The Service Provider will ensure that applicable content of all instructions given to ICE detainees and copies of the Detainee Handbook - as addressed in the PBNDS 2011 standards - are communicated to detainees in a language or manner that the detainee can understand. All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the ICE population with limited English proficiency.

Oral interpretation or assistance shall also be provided to any ICE detainee who speaks another language in which written material has not been translated or who is illiterate.

EXHIBIT 2

EXHIBIT 2

5.8 Voluntary Work Program

I. Purpose and Scope

This detention standard provides detainees opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of the safety, security and good order of the facility.

While not legally required to do so, ICE/ ERO affords working detainees basic Occupational Safety and Health Administration (OSHA) protections.

This detention standard applies to the following types of facilities housing ICE/ERO detainees:

- Service Processing Centers (SPCs);
- Contract Detention Facilities (CDFs); and
- State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours.

Procedures in italics are specifically required for SPCs, CDFs, and Dedicated IGSA facilities. Non-dedicated IGSA facilities must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.

Various terms used in this standard may be defined in standard "7.5 Definitions."

II. Expected Outcomes

The expected outcomes of this detention standard are as follows (specific requirements are defined in "V. Expected Practices").

1. Detainees may have opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of the safety, security and good order of the facility.
2. Detainees shall be able to volunteer for work assignments but otherwise shall not be required to work, except to do personal housekeeping.
3. Essential operations and services shall be enhanced through detainee productivity.
4. The negative impact of confinement shall be reduced through decreased idleness, improved morale and fewer disciplinary incidents.
5. Detainee working conditions shall comply with all applicable federal, state and local work safety laws and regulations.
6. There shall be no discrimination regarding voluntary work program access based on any detainee's race, religion, national origin, gender, sexual orientation or disability.
7. The facility shall provide communication assistance to detainees with disabilities and detainees who are limited in their English proficiency (LEP). The facility will provide detainees with disabilities with effective communication, which may include the provision of auxiliary aids, such as readers, materials in Braille, audio recordings, telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, and note-takers, as needed. The facility will also provide detainees who are LEP with language assistance, including bilingual staff or professional interpretation and translation services, to provide them with meaningful access to its programs and activities.

   All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the population with limited English proficiency.

   Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or

who is illiterate.

III. Standards Affected

This detention standard replaces "Voluntary Work Program" dated 12/2/2008.

This detention standard incorporates the requirements regarding detainees' assigned to work outside of a facility's secure perimeter originally communicated via a memorandum to all Field Office Directors from the Acting Director of U.S. Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) (11/2/2004).

IV. References

American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition: 4-ALDF-5C-06, 5C-08, 5C-11(M), 6B-02.

ICE/ERO *Performance-based National Detention Standards 2011:*

- "1.2 Environmental Health and Safety"; and
- "4.1 Food Service."

V. Expected Practices

A. Voluntary Work Program

Detainees shall be provided the opportunity to participate in a voluntary work program. The detainee's classification level shall determine the type of work assignment for which he/she is eligible. Generally, high custody detainees shall not be given work opportunities outside their housing units/living areas. Non-dedicated IGSAs will have discretion on whether or not they will allow detainees to participate in the voluntary work program.

B. Work Outside the Secure Perimeter

ICE detainees may not work outside the secure perimeter of non-dedicated IGSA facilities.

In SPCs, CDFs, and dedicated IGSAs, low custody detainees may work outside the secure perimeter on facility grounds. They must be directly supervised at a ratio of no less than one staff member to four detainees. The detainees shall be within sight and sound of that staff member at all times.

C. Personal Housekeeping Required

Work assignments are voluntary; however, all detainees are responsible for personal housekeeping.

Detainees are required to maintain their immediate living areas in a neat and orderly manner by:

1. *making their bunk beds daily;*
2. *stacking loose papers;*
3. *keeping the floor free of debris and dividers free of clutter; and*
4. *refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture.*

D. Detainee Selection

The facility administrator shall develop site-specific rules for selecting work detail volunteers. These site-specific rules shall be recorded in a facility procedure that shall include a voluntary work program agreement. The voluntary work program agreement shall document the facility's program and shall be in compliance with this detention standard.

The primary factors in hiring a detainee as a worker shall be his/her classification level and the specific requirements of the job.

1. *Staff shall present the detainee's name to the shift supervisor or the requesting department head.*
2. *The shift supervisor or department head shall review the detainee's classification and other relevant documents in the detainee's detention file.*
3. *The shift supervisor or department head shall*

assess the detainee's language skills because these skills affect the detainee's ability to perform the specific requirements of the job under supervision. To the extent possible, work opportunities shall be provided to detainees who are able to communicate with supervising staff effectively and in a manner that does not compromise safety and security.

4. *Inquiries to staff about the detainee's attitude and behavior may be used as a factor in the supervisor's selection.*

Staff shall explain the rules and regulations as well as privileges relating to the detainee worker's status. The detainee shall be required to sign a voluntary work program agreement before commencing each new assignment. Completed agreements shall be filed in the detainee's detention file.

E. Special Details

Detainees may volunteer for temporary work details that occasionally arise. The work, which generally lasts from several hours to several days, may involve labor-intensive work.

F. Discrimination in Hiring Prohibited

Detainees shall not be denied voluntary work opportunities on the basis of such factors as a detainee's race, religion, national origin, gender, sexual orientation or disability.

G. Detainees with Disabilities

The facility shall allow, where possible, detainees with disabilities to participate in the voluntary work program in appropriate work assignments. Consistent with the procedures outlined in Standard 4.8 "Disability Identification, Assessment, and Accommodation," the facility shall provide reasonable accommodations and modifications to its policies, practices, and/or procedures to ensure that detainees with disabilities have an equal opportunity to access, participate in, and benefit from the voluntary work programs.

H. Hours of Work

Detainees who participate in the volunteer work program are required to work according to a schedule.

The normal scheduled workday for a detainee employed full time is a maximum of 8 hours. Detainees shall not be permitted to work in excess of 8 hours daily, 40 hours weekly.

Unexcused absences from work or unsatisfactory work performance may result in removal from the voluntary work program.

I. Number of Details in One Day

The facility administrator may restrict the number of work details permitted a detainee during one day.

In SPCs, CDFs, and dedicated IGSAs a detainee may participate in only one work detail per day.

J. Establishing Detainee Classification Level

If the facility cannot establish the classification level in which the detainee belongs, the detainee shall be ineligible for the voluntary work program.

K. Compensation

Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy.

The compensation is at least $1.00 (USD) per day. The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released.

L. Removal of Detainee from Work Detail

A detainee may be removed from a work detail for such causes as:

1. unsatisfactory performance;
2. disruptive behavior, threats to security, etc.;
3. physical inability to perform the essential

elements of the job due to a medical condition or lack of strength;

4. prevention of injuries to the detainee; and/or
5. a removal sanction imposed by the Institution Disciplinary Panel for an infraction of a facility rule, regulation or policy.

When a detainee is removed from a work detail, the facility administrator shall place written documentation of the circumstances and reasons in the detainee detention file.

Detainees may file a grievance to the local Field Office Director or facility administrator if they believe they were unfairly removed from work, in accordance with standard "6.2 Grievance System."

M. Detainee Responsibility

The facility administrator shall establish procedures for informing detainee volunteers about on-the-job responsibilities and reporting procedures.

The detainee is expected to be ready to report for work at the required time and may not leave an assignment without permission.

1. The detainee shall perform all assigned tasks diligently and conscientiously.
2. The detainee may not evade attendance and performance standards in assigned activities nor encourage others to do so.
3. The detainee shall exercise care in performing assigned work, using safety equipment and taking other precautions in accordance with the work supervisor's instructions.
4. In the event of a work-related injury, the detainee shall notify the work supervisor, who shall immediately implement injury-response procedures.

N. Detainee Training and Safety

All detention facilities shall comply with all applicable health and safety regulations and standards.

The facility administrator shall ensure that all department heads, in collaboration with the facility's safety/training officer, develop and institute appropriate training for all detainee workers.

1. The voluntary work program shall operate in compliance with the following codes and regulations:

   a. Occupational Safety and Health Administration (OSHA) regulations;

   b. National Fire Protection Association 101 Life Safety Code; and

   c. International Council Codes (ICC).

   Each facility administrator's designee is responsible for providing access to complete and current versions of the documents listed above.

   The facility administrator shall ensure that the facility operates in compliance with all applicable standards.

2. Upon a detainee's assignment to a job or detail, the supervisor shall provide thorough instructions regarding safe work methods and, if relevant, hazardous materials, including:

   a. safety features and practices demonstrated by the supervisor; and

   b. recognition of hazards in the workplace, including the purpose for protective devices and clothing provided, reporting deficiencies to their supervisors (staff and detainees who do not read nor understand English shall not be authorized to work with hazardous materials).

   A detainee shall not undertake any assignment before signing a voluntary work program agreement that, among other things, confirms that the detainee has received and understood training from the supervisor about the work assignment.

The voluntary work program agreement, which each detainee is required to sign prior to commencing each new assignment, shall be placed in the detainee's detention file.

3. For a food service assignment, medical staff, in conjunction with the U.S. Public Health Service, shall ensure that detainees are medically screened and certified before undertaking the assignment.
4. The facility shall provide detainees with safety equipment that meets OSHA and other standards associated with the task performed.
5. The facility administrator shall ensure that the facility operates in compliance with all applicable standards.

O. Detainee Injury and Reporting Procedures

The facility administrator shall implement procedures for immediately and appropriately responding to on-the-job injuries, including immediate notification of ICE/ERO.

If a detainee is injured while performing his/her work assignment:

1. The work supervisor shall immediately notify facility medical staff. In the event the accident occurs in a facility that does not provide 24-hour medical care, the supervisor shall contact the on-call medical officer for instructions.
2. First aid shall be administered as necessary.
3. Medical staff shall determine what treatment is necessary and where that treatment shall take place.
4. The work supervisor shall complete a detainee accident report and submit it to the facility administrator for review and processing and file it in the detainee's detention file and A-file.

EXHIBIT 3

EXHIBIT 3

U.S. Department of Homeland Security
Immigration and Customs Enforcement
Office of Professional Responsibility
Inspections and Detention Oversight Division
Washington, DC 20536-5501

Office of Detention Oversight
Performance-Based
National Detention Standard

Enforcement and Removal Operations
ERO El Paso Field Office
Cibola County Detention Center
Milan, New Mexico

January 9-11, 2018

COMPLIANCE INSPECTION
for the
CIBOLA COUNTY CORRECTIONAL CENTER
Milan, New Mexico

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COMPLIANCE INSPECTION TEAM MEMBERS

(b) (6), (b) (7)(C)

Lead Inspections and Compliance Specialist	ODO
Inspections and Compliance Specialist	ODO
Inspections and Compliance Specialist	ODO
Contractor	Creative Corrections
Contractor	Creative Corrections
Contractor	Creative Corrections
Contractor	Creative Corrections

FACILITY OVERVIEW

The Office of Detention Oversight (ODO) conducted a compliance inspection of the Cibola County Correctional Center (CCCC), in Milan, New Mexico from January 9-11, 2018[1]. The CCCC opened in August 1994 and is owned and operated by CoreCivic. The Office of Enforcement and Removal Operations (ERO) began housing detainees at CCCC in December 2016, pursuant to an Intergovernmental Agreement (IGA), under oversight of the ERO Field Office Director (FOD) in El Paso. The facility has signed and is obligated to comply with the PBNDS 2011 contract modification.

ERO Deportation Officers (DO) are assigned to the facility on a rotating basis from the ERO Albuquerque sub-office. No Detention Service Monitor is assigned to this facility. A warden is responsible for daily operations and is supported by [redacted] personnel. CoreCivic provides food service. Detainee medical care is provided by Correct Care Solutions. The facility does not currently hold any external accreditations.

Capacity and Population Statistics	Quantity
ICE Detainee Bed Capacity[2]	500
Average ICE Detainee Population[3]	281
Male Detainee Population (as of 1/9/2018)	277
Transgender Female[4] Population (as of 1/9/2018)	23

This is ODO's first inspection of the facility.

[1] This facility holds male detainees with low, medium low, medium high, and high security classification levels for periods greater than 72 hours.
[2] Data Source: ERO Facility List Report as of January 08, 2018.
[3] *Ibid.*
[4] This facility houses male detainees. However, the facility also maintains a special housing unit, separate from the general population, for transgendered detainees who identify as female, hereafter referred to as "transgender females."

FY 2018 FINDINGS BY PBNDS 2011 MAJOR CATEGORIES

PBNDS 2011 STANDARDS INSPECTED[5]	DEFICIENCIES
Part 1 - Safety	
Environmental Health and Safety	2
Sub-Total	**2**
Part 2 - Security	
Admission and Release	2
Custody Classification System	1
Funds and Personal Property	1
Sexual Abuse and Assault Prevention and Intervention	2
Special Management Units	4
Staff-Detainee Communication	5
Use of Force and Restraints	4
Sub-Total	**19**
Part 4 - Care	
Food Service	3
Medical Care	1
Medical Care (Women)	0
Significant Self-harm and Suicide Prevention and Intervention	0
Sub-Total	**4**
Part 5 - Activities	
Telephone Access	4
Sub-Total	**4**
Part 6 - Justice	
Detainee Handbook	0
Grievance System	0
Law Libraries and Legal Materials	2
Sub-Total	**2**
Total Deficiencies	**31**

[5] For greater detail on ODO's findings, see the *Inspection Findings* section of this report.

COMPLIANCE INSPECTION PROCESS

ODO conducts oversight inspections of ICE detention facilities with an average daily population greater than ten, and where detainees are housed for over 72 hours, to assess compliance with ICE National Detention Standards (NDS) 2000, or the Performance-Based National Detention Standards (PBNDS) 2008 or 2011, as applicable. These inspections focus solely on facility compliance with detention standards that directly affect detainee life, health, safety, and/or well-being.[6] ODO identifies violations linked to ICE detention standards, ICE policies, or operational procedures as *deficiencies.*

For facilities governed by either the PBNDS 2008 or 2011, ODO specifically notes deficiencies related to ICE-designated "priority components" which are considered *critical* to facility security and the legal and civil rights of detainees. ODO also highlights instances when the facility resolves deficiencies prior to completion of the ODO inspection--these corrective actions are annotated with "C" under the *Inspection Findings* section of this report.

At the conclusion of each inspection, ODO holds a closeout briefing with facility and local ERO officials to discuss preliminary findings. A summary of these findings is also shared with ERO management officials. Thereafter, ODO provides ICE leadership with a final compliance inspection report to (i) assist ERO in developing and initiating corrective action plans and (ii) provide senior executives with an independent assessment of facility operations. Additionally, ODO findings inform ICE executive management decision making in better allocating resources across the agency's entire detention inventory.

[6] ODO reviews the facility's compliance with selected standards in their entirety.

DETAINEE RELATIONS

ODO interviewed fifteen (15) detainees, each of whom volunteered to participate. None of the detainees made allegations of discrimination, mistreatment, or abuse. The majority of detainees reported being satisfied with facility services, with the exception of the below concerns.

Detainee Handbook: Six (6) detainees stated they did not receive the facility and/or ICE handbook during admission to the facility.

- Action Taken: During its review of 38 detention files, ODO found 8 instances where detainees did not sign for a handbook(s). ODO brought this concern to the attention of the facility and ERO staff and, prior to the end of the inspection, each detainee was reissued the specific handbook they needed. ODO recommends the ERO field office and facility staff review current intake procedures to improve handbook issuance and tracking to avoid these issues in the future. *See* the *Inspection Findings (Admission and Release)* section of this report for further information.

Food Service: Five (5) detainees claimed the food is typically served cold and has a bad taste.

- Action Taken: ODO interviewed facility staff and confirmed the cyclical menu has been approved by a registered dietician. Although trays were served within the two-hour limit, ODO used a facility-provided digital thermometer to test food temperatures and found the hot food temperatures were well below the acceptable levels. Specifically, hot items fell below the required threshold of 140 degrees and the temperature of the beans served for lunch, for instance, was 81 degrees Fahrenheit, prior to leaving the kitchen. *See* the *Inspection Findings (Food Service)* section of this report for further information.

Personal Hygiene: One (1) detainee alleged he was denied use of the restroom while waiting for court.

- Action Taken: ODO reported the allegation to ERO and the facility. The issue was then referred to the facility investigator for further review. The facility's investigation was still ongoing at the end of the ODO inspection.

Sexual Assault Awareness and Prevention Intervention: Three (3) detainees claimed when officers of the opposite sex enter the housing units they do not consistently announce their presence.

- Action Taken: ODO informed the ERO Assistant Field Office Director (AFOD) that 6 CFR Part 115, Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities (Final Rule dated March 7, 2014) requires officers of the opposite sex entering the housing unit to announce themselves.

COMPLIANCE INSPECTION FINDINGS

SAFETY

ENVIRONMENTAL HEALTH AND SAFETY (EH&S)

ODO inspected the haircutting areas in each housing unit as well as all barbering kits and found no disinfectant(s) or proper waste disposal containers **(Deficiency EH&S-1[7])**. Postings of sanitation regulations were also missing from these areas **(Deficiency EH&S-2[8])**.

ODO additionally determined clippers were not sanitized between individual haircuts **(Deficiency EH&S-3[9])**.

> *Corrective Action:* Prior to completion of the inspection, the facility initiated corrective action by posting barbering rules and regulations in all required areas. Disinfectant(s) and waste disposal containers were also distributed accordingly **(C-1)**.

SECURITY

ADMISSION AND RELEASE (A&R)

Facility handbooks are provided to detainees in English and Spanish. Additional information on facility procedures are provided via in-person meetings with the unit counselor or case manager. However, the facility does not have an orientation video and the facility's orientation procedures were not approved by ERO **(Deficiency A&R-1[10])**.

ODO reviewed 38 detention files and determined there were eight detainees who did not sign handbook receipts upon arrival to the facility **(Deficiency A&R-2[11])**.

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[7] "Detailed hair care sanitation regulations shall be conspicuously posted in each barbershop for the use of all hair care personnel and detainees. Cotton pads, absorbent cotton and other single or dispensable toilet articles may not be reused, and shall be placed in a proper waste receptacle immediately after use. The common use of brushes, neck dusters, shaving mugs and shaving brushes is prohibited." *See* ICE PBNDS 2011, Standard, Environmental Health and Safety, Section (V)(E)(2).

[8] "Each barbershop shall have all equipment and facilities necessary for maintaining sanitary procedures for hair care, including covered metal containers for waste, disinfectants, dispensable headrest covers, laundered towels, and haircloths." *See* ICE PBNDS 2011, Standard, Environmental Health and Safety, Section (V)(E)(4).

[9] "After each detainee visit, all hair care tools that came into contact with the detainee shall be cleaned and effectively disinfected. Ultraviolet lights are not appropriate for sterilization but may be used for maintaining tools that have already been properly sterilized." *See* ICE PBNDS 2011, Standard, Environmental Health and Safety, Section (V)(E)(3).

[10] "All facilities shall have a method to provide ICE/ERO detainees an orientation to the facility as soon as practicable, in a language or manner that detainees can understand. Orientation procedures in CDFs and IGSAs must be approved in advance by the local ICE/ERO Field Office." *See* ICE PBNDS 2011, Standard, Admission and Release, Section (V)(F).

[11] "As part of the admissions process, the detainee shall acknowledge receipt of the handbook and supplement by signing where indicated on the back of the Form I-385 (or on a separate form)." *See* ICE PBNDS 2011, Standard, Admission and Release, Section (V)(G)(4).

CUSTODY CLASSIFICATION SYSTEM (CCS)

ODO reviewed 38 randomly selected detainee classification files and found all required documentation was completed within 72 hours of admission and approved by a supervisor. However, in comparing a list of the 38 files to the detainee housing roster, ODO found one discrepancy where a transgendered detainee should have been classified as "high." Staff confirmed this detainee was recently re-classified due to a disciplinary infraction. However, the housing assignment was deemed appropriate given an existing ICE waiver for the transgender housing area **(Deficiency CCS-1[12])**.

In reviewing the daily housing rosters provided by the facility, ODO found 26 detainees did not have a classification level notated. ODO then reviewed the files of the 26 detainees and confirmed each detainee was classified by ERO prior to their arrival at the facility and were appropriately housed according to their classification level. ODO brought this discrepancy to the attention of facility staff on the first day of the inspection; however, the rosters for days two and three of the inspection continued to contain these omissions. Although detainee classification was completed as required by the standard, and all detainees were housed appropriately, ODO cites inaccurate record keeping as an Area of Concern. Improper maintenance and updating of the computerized housing rosters has the potential to result in prohibited co-mingling of detainees within housing areas.

FUNDS AND PERSONAL PROPERTY (F&PP)

ODO reviewed the detainee handbook and interviewed senior facility staff. ODO determined the facility handbook did not inform detainees they may be provided a certified copy of their identity documents. Additionally the handbook does not inform detainees of the procedures for claiming property upon release, transfer, or removal, and how to access their personal funds to pay for legal services **(Deficiency F&PP-1[13])**.

> *Corrective Action:* Prior to the completion of the inspection, the facility initiated corrective action by adding the required information to both the facility's English and Spanish handbooks. Copies of the excerpts were then highlighted and posted on the main bulletin board of each ICE housing unit **(C-1)**.

SEXUAL ABUSE AND ASSAULT PREVENTION AND INTERVENTION (SAAPI)

According to CCCC policy, 14-2 *DHS Sexual Abuse Prevention and Response*, the facility accommodates detainees with disabilities or limited English proficiency by providing auxiliary aids such as readers, materials in Braille, audio recordings, telecommunications devices for the deaf (TTYs), and interpreters. ODO's request to review the facility's materials for the blind and

[12] "Special Reclassification Assessments Staff shall complete a special reclassification within 24 hours before a detainee leaves the Special Management Unit (SMU), following an incident of abuse or victimization, and at any other time when warranted based upon the receipt of additional, relevant information, such as after a criminal act, or if a detainee wins a criminal appeal, is pardoned or new criminal information comes to light." *See* ICE PBNDS 2011, Standard, Custody Classification System, Section (V)(H)(3).

[13] "The detainee handbook or equivalent shall notify the detainees of facility policies and procedures related to personal property, including: that, upon request, they shall be provided an ICE/ERO-certified copy of any identity document (e.g., passport, birth certificate), which shall then be placed in their A-files; the procedure for claiming property upon release, transfer, or removal; access to detainee personal funds to pay for legal services." *See* ICE PBNDS 2011, Standard, Funds and Personal Property, Section (V)(C)(2)(4)(6).

low vision impairments found the facility has no resources to support detainees with these types of disabilities **(Deficiency SAAPI–1[14])**.

CCCC has a signed Memorandum of Agreement with the Milan Police Department (MPD) to conduct investigations on any allegations that are criminal in nature. However, ODO reviewed the CCCC Sexual Abuse Prevention and Response policy and determined it does not contain all of the required procedures for administrative investigations **(Deficiency SAAPI–2[15])**.

Additionally, ODO identified an area of concern with respect to the fact that there is a limited opportunity for detainees to view the CCCC Prison Rape Elimination Act (PREA) orientation video, which is provided in English and Spanish. While the facility shows the "PREA: What You Need to Know" video that was produced by the National PREA Resource Center in both English and Spanish in the housing units, each video is only shown once a day at 7:00 pm and 8:00 pm, respectively. Depending on when individuals are transferred to the facility, extensive periods of time could pass before detainees are provided with this information.

> *Corrective Action:* To address this concern, the facility PREA coordinator and chief investigator arranged to have the television in the medical waiting area play the two PREA videos on a continuous loop, so they can be viewed by detainees waiting for their initial medical screening during the admission process. This additional viewing opportunity will augment, not replace, the current daily presentation shown in the housing units. ODO commends CCCC staff for their responsiveness in resolving this area of concern (**C-2**).

SPECIAL MANAGEMENT UNITS (SMU)

Documentation provided by staff indicated there were 11 placements in the SMU during the year preceding the inspection. ODO reviewed the 11 SMU files and found seven files did not contain administrative segregation orders **(Deficiency SMU-1[16])**.

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[14] "Each facility shall take appropriate steps to ensure that detainees with disabilities (including, for example, detainees who are deaf or hard of hearing, those who are blind or have low vision, or those who have intellectual, psychiatric, or speech disabilities) have an equal opportunity to participate in or benefit from all aspects of the facility's efforts to prevent, detect, and respond to sexual abuse." *See* ICE PBNDS 2011, Standard, Sexual Abuse and Assault Prevention and Intervention, Section (V)(G).

[15] "The facility shall develop written procedures for administrative investigations, including provisions requiring: preservation of direct and circumstantial evidence, including any available physical and DNA evidence and any available electronic monitoring data; reviewing prior complaints and reports of sexual abuse involving the suspected perpetrators; assessment of the credibility of an alleged victim, suspect, or witness, without regard to the individual's status as detainee, staff, or employee, and without requiring any detainee who alleges sexual abuse to submit to a polygraph; an effort to determine whether actions or failures to act at the facility contributed to the abuse; documentation of each investigation by written report, which shall include a description of physical and testimonial evidence, the reasoning behind credibility assessments, and investigative facts and findings; and retention of such reports for as long as the alleged abuser is detained or employed by the agency or facility, plus five years." *See* ICE PBNDS 2011, Standard, Sexual Abuse and Assault Prevention and Intervention, Section, (V)(M)(3)(a)(c through g).

[16] "Prior to a detainee's actual placement in administrative segregation, the facility administrator or designee shall complete the administrative segregation order (Form I-885 or equivalent), detailing the reasons for placing a detainee in administrative segregation…The administrative segregation order shall be immediately provided to the detainee in a language or manner the detainee can understand, unless delivery would jeopardize the safe, secure, or orderly operation of the facility." *See* ICE PBNDS 2011, Standard, Special Management Units, Section (V)(A)(2)(a)(e)**.**

ODO reviewed the 11 SMU files and found two files did not contain disciplinary segregation orders **(Deficiency SMU-2[17]).**

ODO interviewed senior SMU staff and determined detainee housing records are not forwarded to the Chief of Security when a detainee is released from SMU, as required by the standard. ODO's subsequent review of detention files for the 11 detainees placed in SMU found nine files with missing documentation **(Deficiency SMU-3[18])**.

CCCC does not maintain a log of detainees assigned to SMU, nor does it consistently notify ERO of detainee placements, releases, and reviews **(Deficiency SMU-4[19])**. Without a log, ODO was unable to definitively determine how many detainees were actually placed in administrative segregation during the year preceding the inspection.

STAFF-DETAINEE COMMUNICATION (SDC)

The facility handbook includes contact information for the ERO Field Office as well as the scheduled hours and days that ICE staff is available for staff detainee communication. However, the information was not posted in the detainee living areas **(Deficiency SDC-1[20])**.

On the second day of the inspection, ODO's tour of housing unit 400 found numerous detainee requests stuffed in the drop-box. ODO informed the ICE Deportation Officer (DO) of the issue, who then checked, cleared and initiated appropriate responses for the requests found in the drop-box. A review of the requests within the drop-box indicated it had not been checked since December 28, 2017. Based on the dates of the requests they were not responded to within the

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[17] "A written order shall be completed and signed by the chair of the IDP (or disciplinary hearing officer) before a detainee is placed into disciplinary segregation: a. Prior to a detainee's actual placement in disciplinary segregation, the IDP chairman shall complete the disciplinary segregation order (Form I-883 or equivalent), detailing the reasons for placing a detainee in disciplinary segregation. All relevant documentation must be attached to the order. b. The completed disciplinary segregation order shall be immediately provided to the detainee in a language or manner the detainee can understand, unless delivery would jeopardize the safe, secure, or orderly operation of the facility." *See* ICE PBNDS 2011, Standard, Special Management Units, Section (V)(B)(2)(a)(b). **This is a Priority Component.**

[18] "Upon a detainee's release from the SMU, the releasing officer shall attach that detainee's entire housing unit record to either the administrative segregation order or disciplinary segregation order and forward it to the Chief of Security or equivalent for inclusion into the detainee's detention file." *See* ICE PBNDS 2011, Standard, Special Management Units, Section, (V)(D)(3)(d).

[19] "The facility administrator must notify the appropriate Field Office Director in writing as soon as possible, but no later than 72 hours after the initial placement of an ICE detainee in segregation if: a. The detainee has been placed in administrative segregation on the basis of a disability, medical or mental illness, or other special vulnerability, or because the detainee is an alleged victim of a sexual assault, is an identified suicide risk, or is on a hunger strike; or…4. The facility administrator shall provide all information and supporting documentation regarding segregation placements as requested by the Field Office Director. The facility administrator shall also coordinate with the Field Office Director in: a. considering whether a less restrictive housing or custodial option is appropriate and available, including return to the general population or options to limit isolation while housed in the SMU, such as additional out of cell time and the ability to participate in group activities." *See* ICE PBNDS 2011, Standard, Special Management Units, Section, (V)(C)(2)(3)(4)(a).

[20] "The local supplement to the detainee handbook shall include contact information for the ICE/ERO Field Office and the scheduled hours and days that ICE/ERO staff is available to be contacted by detainees at the facility. The same information shall be posted in the living areas (or "pods") of the facilities." *See* ICE PBNDS 2011, Standard, Staff-Detainee Communication, Section (V)(A).

three-day timeframe required by the standard **(Deficiency SDC-2[21])**.

ODO's review of the requests logbook found that well over 50% of the logbook entries did not have a return date **(Deficiency SDC-3[22])**. As a result, it was impossible for ODO to be able to determine whether or not the detainee requests were reviewed, processed and appropriately responded to in a timely fashion, i.e. within 72 hours of the request being made.

ODO reviewed six months of ERO weekly inspection sheets to verify weekly telephone checks are completed and records are maintained. ODO determined only three telephone serviceability worksheets were completed during the six month timeframe **(Deficiency SDC-4[23])**.

ODO toured all ICE housing units, the SMU and common areas of the facility and found that no OIG posters were posted in: the housing unit 900; the intake area; the medical department; the recreation areas; or any of the law libraries. ODO took note that the intake area of the facility had an ICE Zero Tolerance for Sexual Abuse and Assault Poster with an OIG telephone number on it but not the required DHS OIG Hotline poster **(Deficiency SDC-5[24])**.

> *Corrective Action:* Prior to the completion of the inspection, the Unit Manager took corrective action by laminating and posting color copies of the required OIG Posters, in both English and Spanish in all housing units, the SMU, intake, law libraries, and recreation areas **(C-3)**.

USE OF FORCE AND RESTRAINTS (UOF&R)

CCCC staff identified two calculated and two immediate uses of force incidents involving detainees in the year preceding the inspection. ODO's review of written documentation confirmed the detainees were medically examined after the incidents; however, none of the video recordings of the medical exam included close-ups of the detainee's body **(Deficiency UOF&R-1[25])**.

Although written reports were completed by each staff member involved in the calculated use of force incidents, reports were not completed by all staff involved in the two immediate use of

[21] "In facilities without ICE/ERO Onsite Presence, each detainee request shall be forwarded to the ICE/ERO office of jurisdiction within two business days and answered as soon as practicable, in person or in writing, but no later than within three business days of receipt. All dates shall be documented." *See* ICE PBNDS 2011, Standard, Staff-Detainee Communication, Section (V)(B)(1)(b).
[22] "All requests shall be recorded in a logbook (or electronic logbook) specifically designed for that purpose. At a minimum, the log shall record: …date that the request, with staff response and action, was returned to the detainee." *See* ICE PBNDS 2011, Standard, Staff-Detainee Communication, Section (V)(B)(2)(f).
[23] "Staff shall document each serviceability test on a form that has been provided by ERO, and each Field Office shall maintain those forms, organized by month, for three years." *See* ICE PBNDS 2011, Standard, Staff-Detainee Communication, Section (V)(C).
[24] "The facility administrator shall ensure that posters are mounted in every housing unit and in appropriate common areas (e.g., recreation areas, dining areas, processing areas)." *See* ICE PBNDS 2011, Standard, Staff-Detainee Communication, Section (V)(D)(3).
[25] "Calculated use-of-force incidents shall be audio visually-recorded in the following order: Take close-ups of the detainee's body during a medical exam, focusing on the presence/absence of injuries. Staff injuries, if any, are to be described but not shown." *See* ICE PBNDS 2011, Standard, Use of Force and Restraints, Section (V)(I)(2)(e). **This is a Priority Component**.

force incidents **(Deficiency UOF&R-2[26])**.

ODO's review of one calculated use of force file found it did not contain any documentation confirming the facility administrator or designee gave authorization for the calculated use of force **(Deficiency UOF&R-3[27])**.

An after-action review report was completed for only one of the four, use of force incidents. No documentation was provided to verify if any after-action reviews were completed or if any findings were reported to ERO in the three additional uses of force **(Deficiency UOF&R-4[28])**.

CARE

FOOD SERVICE (FS)

On the first day of the inspection, ODO observed the preparation and plating of detainee meals, and the delivery of detainee food trays from the food service preparation area to the detainee housing units. ODO found the temperatures of the hot and cold items on the serving line were not maintained within proper temperatures for food safety requirements **(Deficiency FS-1[29])**.

> *Corrective Action:* Prior to completion of the inspection, corrective action was initiated by the food service staff by increasing the heat source on the serving line assembly cart and placing ice under the pans of pudding to maintain the required temperatures **(C-4)**.

After tray assembly was completed, ODO observed the transport and delivery of the carts to Unit 100 by facility staff. Upon arrival to the unit, the cart was left in the pod unsupervised and not passed on to another staff member **(Deficiency FS-2[30])**. Though the food cart was left unsupervised for only a few minutes, ODO noted detainees in the immediate area could have

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[26] "A written report shall be provided to the shift supervisor by each officer involved in the use of force by the end of the officer's shift." *See* ICE PBNDS 2011, Standard, Use of Force and Restraints, Section (V)(H)(4).

[27] "A calculated use of force needs to be authorized in advance by the facility administrator (or designee)." *See* ICE PBNDS 2011, Standard, Use of Force and Restraints, Section (V)(I).

[28] "The facility administrator, the assistant facility administrator, the Field Office Director's designee and the health services administrator (HSA) shall conduct the after-action review. This four-member after-action review team shall convene on the workday after the incident. The after-action review team shall gather relevant information, determine whether policy and procedures were followed, make recommendations for improvement, if any, and complete an after-action report to record the nature of its review and findings. The after-action report is due within two workdays of the detainee's release from restraints; The after-action review team shall also review the audiovisual recording of any use-of-force incidents for compliance with all provisions of this standard; Within two workdays of the after-action review team's submission of its determination, the facility administrator shall report with the details and findings of appropriate or inappropriate use of force, by memorandum, to the Field Office Director and whether he/she concurs with the finding; The review team's investigative report will be forwarded to the Field Office Director for review. The Field Office Director will determine whether the incident shall be referred to the Office of Professional Responsibility, the Department of Homeland Security, Office of the Inspector General or the Federal Bureau of Investigation." *See* ICE PBNDS 2011, Standard, Use of Force and Restraints, Section (V)(P)(3)(4)(5)(6).

[29] "Before and during the meal, the CS in charge shall inspect the food service line to ensure: sanitary guidelines are observed, with hot foods maintained at a temperature of at least 140F degrees (120 degrees in food trays) and foods that require refrigeration maintained at 41 F degrees or below." *See* ICE PBNDS 2011, Standard, Food Service, Section (V)(D)(2)(a)(3). **This is a Priority Component.**

[30] "Meals shall always be prepared, delivered and served under staff (or contractor) supervision." *See* ICE PBNDS 2011, Standard, Food Service, Section (V)(D(1).

tampered with food trays.

Corrective Action: On the second day of the inspection corrective action was initiated by the food service staff by keeping the food cart under constant supervision of a CCCC staff member **(C-5)**.

During the plating of the meals, ODO observed food service detainee workers wearing gloves; however, neither the detainee servers nor the housing unit staff handing out trays wore gloves or hair nets **(Deficiency FS-3[31])**.

Corrective Action: On the second day of the inspection corrective action was initiated by implementing the practice of wearing the required gloves and hair nets by housing unit detainees and staff personnel distributing food trays **(C-6)**.

MEDICAL CARE

ODO observed an appropriately equipped emergency response bag and automatic external defibrillator (AED) were available in the medical clinic. Policy requires staff to conduct twice daily checks of the emergency equipment to ensure the AED is fully charged and oxygen levels are correct. ODO's review of the emergency equipment log book found these checks were not completed on the first two days of the inspection **(Deficiency MC-1[32])**.

ACTIVITIES

TELEPHONE ACCESS

ODO found telephone access rules are provided to detainees during orientation and provided in the facility handbook. However, the hours and rules for telephone access are not posted consistently near all telephones in both English and Spanish (**Deficiency TA-1[33]**).

Corrective Action: Prior to completion of the inspection the Unit Manager initiated corrective action by posting the rules and hours for telephone access, in both English and Spanish, in each ICE housing unit **(C-7)**.

ODO toured the detainee housing units and found although the facility has postings at each telephone stating calls are subject to monitoring, there are no postings in either English or Spanish informing detainees how to obtain an unmonitored phone call (**Deficiency TA-2[34]**).

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[31] "Servers must wear food-grade plastic gloves and hair nets whenever there is direct contact with a food or beverage. Servers must use tongs, forks, spoons, ladles or other such utensils to serve any food or beverage. Serving food without use of utensils is strictly prohibited." *See* ICE PBNDS 2011, Standard, Food Service, Section (V)(D(2)(c).

[32] "Medical and safety equipment shall be available and maintained, and staff shall be trained in proper use of the equipment." *See* ICE PBNDS 2011, Standard, Medical Care, Section (V)(T)(4).

[33] "Each facility shall provide telephone access rules in writing to each detainee upon admission, and also shall post these rules where detainees may easily see them. ICE/ERO and the facility shall coordinate in posting these rules where practicable in Spanish and in the language of significant segments of the population with limited English proficiency. Telephone access hours shall be posted." *See* ICE PBNDS 2011, Standard, Telephone Access, Section (V)(C).

[34] "Each facility shall have a written policy on the monitoring of detainee telephone calls. If telephone calls are monitored, the facility shall: notify detainees in the detainee handbook, or equivalent, provided upon admission and;

Corrective Action: Prior to completion of the inspection the Unit Manager initiated corrective action by posting, in both English and Spanish, information informing detainees how to obtain an unmonitored phone call in each ICE housing unit **(C-8)**.

Special access numbers to consulates are programmed into the detainee telephone system via a speed dial configuration; however, the consulate lists posted throughout the facility are not current and were dated June 27, 2017 **(Deficiency TA-3[35])**. These listings are updated *quarterly*, which indicates that the posting is more than one cycle behind.

Corrective Action: Prior to completion of the inspection the Unit Manager initiated corrective action by laminating and posting English and Spanish copies of the current Consulate List dated January 11, 2018 in each ICE housing unit **(C-9)**.

ODO reviewed CoreCivic Policy Number 16-100, *Inmate Access to Telephone*, which states facility staff members are responsible for conducting daily checks of the telephone systems and confirming the pro bono numbers are posted. Any reported issues or problems must immediately be logged and reported to ERO staff. However, through interviews of facility staff, ODO found phone testing is inconsistent, as is notification to ERO of identified problems **(Deficiency TA-4[36])**.

JUSTICE

LAW LIBRARIES AND LEGAL MATERIAL

CCCC has four law library rooms and one mobile computer in the facility's SMU which are equipped with Lexis/Nexis computers that are accessible to approximately 365 detainees. ODO inspected all law library computers and found the computers in Units 400 and 900 had error messages stating the subscription to the Lexis/Nexis software licenses had expired, rendering them inoperable for detainee use. In addition to the error messages in units 400 and 900, ODO found computers in Units 100, 200, and the SMU also had outdated versions of the Lexis/Nexis software **(Deficiency LL&LM-1[37])**.

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at each monitored telephone, place a notice that states the following: that detainee calls are subject to monitoring; and the procedure for obtaining an unmonitored call to a court, a legal representative or for the purposes of obtaining legal representation. ICE/ERO and the facility shall coordinate in posting the notice in Spanish and in the language of significant segments of the population with limited English proficiency, where practicable." *See* ICE PBNDS 2011, Standard, Telephone Access, Section (V)(B)(2)(3)(a)(b).

[35] "The Field Office Director shall ensure that all information is kept current and is provided to each facility. Updated lists need to be posted in the detainee housing units. *See* ICE PBNDS 2011, Standard, Telephone Access, Section (V)(E). **This is a Priority Component.**

[36] "Facility staff members are responsible for ensuring on a daily basis that telephone systems are operational and that the free telephone number list is posted. Any identified problems must immediately be logged and reported to the appropriate facility and ICE/ERO staff. *See* ICE PBNDS 2011, Standard, Telephone Access, Section (V)(A)(4).

[37] "Each facility administrator shall designate a facility law library coordinator to be responsible for inspecting legal materials weekly, updating them, maintaining them in good condition and replacing them promptly as needed." *See* ICE PBNDS 2011, Standard, Law Libraries and Legal Material, Section (V)(D)(2). **This is a Priority Component**.

ODO's tour of the law libraries also found the scheduled hours, rules, and library holding were not posted in the SMU, and the scheduled hours were not posted in Unit 200 (**Deficiency LL&LM-2**[38]).

> *Corrective Action:* Prior to the completion of the inspection, the facility initiated corrective action by posting schedules, hours of operation, the rules that govern access to legal materials, and the library's holdings in all law libraries and the SMU (**C-10**).

CONCLUSION

During this inspection, ODO reviewed the facility's compliance with 16 standards under the PBNDS 2011, finding the facility compliant with four (4) standards. ODO found 32 deficiencies in the remaining 12 standards. While this number of deficiencies is in-line with other similarly-sized facilities undergoing their first ODO inspection, the lack of an assigned Detention Service Monitor may have contributed to the total number of findings. Additionally, local leadership shared that initially many staffing positions were supported by short-term detail assignments, limiting the opportunity to develop a fully-trained and mature workforce. Given these challenges, ODO commends facility staff for their responsiveness throughout the inspection and notes 11 instances where staff took immediate corrective action to resolve deficiencies found during the course of the inspection. ODO recommends ERO work with the facility to remedy any deficiencies which remain outstanding, as applicable and in accordance with contractual obligations.

Compliance Inspection Results Compared	FY 2017 (PNDS 2011)
Standards Reviewed	16
Deficient Standards	12
Overall Number of Deficiencies	32
Deficient Priority Components	5
Corrective Action	10

[38] "These policies and procedures shall also be posted in the law library, along with a list of the law library's holdings. The list of the law library's holdings shall be kept up to date, and shall include the date and content of the most recent updates of all legal materials available to detainees in print and electronic media." *See* ICE PBNDS 2011, Standard, Law Libraries and Legal Material, Section (V)(N).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DESMOND NDAMBI *et al.*, *

Plaintiff, *

Civil Action No. RDB-18-3521

v. *

CORECIVIC, INC., *

Defendant. *

* * * * * * * * * * * * * *

MEMORANDUM ORDER

Plaintiffs are former Immigration and Customs Enforcement (ICE) detainees who were held at the Cibola County Correctional Facility ("Cibola") in New Mexico while awaiting civil immigration proceedings. (Compl. ¶¶ 1-3, ECF No. 1.) They bring this purported class action against Defendant, CoreCivic Inc. ("CoreCivic"), who owns and operates the detention facility where Plaintiffs were held pursuant to an Intergovernmental Service Agreement between ICE and Cibola County. (*Id.* at ¶ 19.) Defendant operates a work program at Cibola where detainees are permitted to voluntarily perform work duties in the facility. (*Id.* at ¶ 26.) Plaintiffs participated in this work program at Cibola. (*Id.* ¶¶ 34-54.) Plaintiffs filed a complaint in this Court based on federal question, diversity, and supplemental jurisdiction pursuant to 28 U.S.C. §§ 1331[1], 1332[2], and 1367[3]. (*Id.* at ¶¶ 4-8.) Plaintiffs allege they were

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[1] 29 U.S.C. § 206 (Fair Labor Standards Act) is a Federal Statute.

[2] Defendant is organized under Maryland Law, and at least one class member of the purported class action is of diverse citizenship from Defendant.

[3] This Court has supplemental jurisdiction over the New Mexico State law claims as they arise out of the same occurrence as the alleged Federal claim.

employees of CoreCivic under the Fair Labor Standards Act ("FLSA") and New Mexico Minimum Wage Act ("NMMWA") and were paid at a rate below that which is required by the FLSA and NMMWA and that the Defendant was unjustly enriched by these alleged violations. (*Id.* at ¶¶ 89-110) Defendant filed a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) arguing that Plaintiffs' claims should be dismissed as the Plaintiffs were not "employees" under the FLSA and NMMWA and, thus, not required to be paid minimum wage. (Mot. Mem. 1, ECF No. 36-1.)

Now pending before this Court is Defendants' Motion to Dismiss (ECF No. 36) and Plaintiffs' Motion for Conditional Certification and Issuance of Notice (ECF No. 43). The parties' submissions have been reviewed, and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2018). As discussed below, Plaintiffs cannot be considered "employees" of the Defendant during their detention. Therefore, this Court shall GRANT Defendant's dismissal motion, and Plaintiffs' motion for certification shall be DENIED AS MOOT.

STANDARD OF REVIEW

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). While a complaint need not include "detailed factual allegations," it must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing a Rule 12(b)(6) motion, a court " 'must accept as true all of the factual allegations contained in the complaint' " and must " 'draw all

reasonable inferences [from those facts] in favor of the plaintiff.' " *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (citations omitted); *Hall v. DirectTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017). However, a court is not required to accept legal conclusions drawn from those facts. *Iqbal*, 556 U.S. at 678.

ANALYSIS

I. Plaintiffs were not employees under the FLSA and NMMWA as they were detainees being held in anticipation of civil immigration proceedings.

Plaintiffs contend that they were entitled to be paid a minimum wage by the Defendant for work program they engaged in while being held as detainees at Cibola. Plaintiffs allege that they were employees, as defined by the FLSA and NMMWA, and that, as employees, Defendant was required to pay them the minimum wage as set by the federal government and the State of New Mexico. (Compl. at ¶¶ 34-54, ECF No. 1.) Defendant argues that the Plaintiffs were not employees, as they were detainees being held in custody pending civil immigration proceedings and the economic reality of the detention could not have given rise to an employment relationship as contemplated by the FLSA and NMMWA. (Mot. Mem. 12, ECF 36-1.)

Both the FLSA and NMMWA require employers to compensate employees for all hours worked at a rate that is not less than the minimum wage. 29 U.S.C. § 206(a)(1); NM ST § 4-22. The FLSA and NMMWA only apply to "employees." 29 U.S.C. § 206(a)(1); NM ST § 4-22. The definition of employee in the FLSA and NMMWA are similar. *Garcia v. American Furniture Co.*, 689 P.2d 934, 937 (N.M. Ct. App. 1984) (noting that the definition of "employ" was almost identical in the New Mexico statute as in the FLSA). Courts generally look to the "economic reality" of an individual's status in determining whether they are an "employee."

Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961). The Fourth Circuit has held that prisoners are not "employees" under the FLSA. *Harker v. State Use Industries*, 990 F.2d 131, 133 (4th Cir. 1993). The Fifth Circuit has held that civil immigration detainees, like prison inmates, are not "employees" as contemplated by the FLSA. *Alvarado Guevara v. I.N.S.*, 902 F. 2d 394, 396 (5th Cir. 1990).

In this case, Plaintiffs cannot be considered "employees" as defined by the FLSA or NMMWA. CoreCivic, under the Intergovernmental Service Agreement, was required to offer a voluntary work program for ICE detainees at Cibola. (Def. Mot. to Dismiss at 2 ECF No. 36-1.) Plaintiffs were incarcerated detainees in this facility awaiting civil immigration proceedings and engaged in work offered by the Defendant on an entirely voluntary basis through this program. (Compl. at ¶¶ 34-54 ECF No. 1.) The economic reality of the Plaintiffs' situation is almost identical to a prison inmate and does not share commonality with that of a traditional employer-employee relationship. Accordingly, Plaintiffs were not "employees" of the Defendant during their detention.

II. As Plaintiffs were not employees under the FLSA and NMMWA, their claims against CoreCivic pursuant to these laws (Counts I and II) must be dismissed.

In order to bring a claim under the FLSA or NMMWA, Plaintiffs must show that they are employees of the Defendant. 29 U.S.C. § 206(a)(1); NM ST § 4-22. In this case, Plaintiffs, as detainees, were not employees of CoreCivic and are not entitled to bring a claim against the Defendant under the FLSA or the NMMWA. As a result, Plaintiffs' claims under the FLSA and NMMWA shall be DISMISSED WITH PREJUDICE.

III. As Defendant's actions were lawful, Plaintiffs claim of unjust enrichment (Count III) must be dismissed.

Plaintiffs also allege that Defendant's use of their labor constitutes unjust enrichement in violation of New Mexico law. (Compl. at ¶¶ 105-10 ECF No. 1.) To prevail in an unjust enrichment claim ". . .one must show that: (1) another has been knowingly benefitted at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Ontiveros Insulation Co., Inc. v. Sanchez*, 3 P.3d 695, 698 (N.M. Ct. App. 2000).

The Plaintiffs' claim of unjust enrichement against CoreCivic is entirely dependent on CoreCivic's alleged violation of the FLSA and NMMWA. (Compl. ECF No. 1 at 21-22.) As Defendant's actions in this case were not in violation of the FLSA or NMMWA since the Plaintiffs were not "employees", Plaintiffs' claim of unjust enrichment is not cognizable and shall be DISMISSED WITH PREJUDICE.

IV. Plaintiffs' Motion for Conditional Certification and Issuance of Notice must be denied as moot.

As the Plaintiffs have no cognizable claims, it is not necessary for this Court to analyze the issue of conditional certification. Accordingly, the Plaintiffs' Motion for Conditional Certification and Issuance of Notice shall be DENIED AS MOOT.

CONCLUSION

For the foregoing reasons, it is HEREBY ORDERED this 27th day of September 2019 that:

1. Defendant's Motion to Dismiss (ECF No. 36) is GRANTED;
2. Plaintiffs Complaint (ECF No. 1) is DISMISSED WITH PREJUDICE;
3. Plaintiffs Motion for Conditional Certification and Issuance of Notice (ECF No. 43) is DENIED AS MOOT;
4. The Clerk of Court shall transmit a copy of this Order to counsel of record;
5. The Clerk of Court shall CLOSE THIS CASE.

_____/s/_____
Richard D. Bennett
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Desmond Ndambi. et al., Plaintiffs, vs. CoreCivic Inc., Defendant.	Case No. 1:18-cv-3521-RDB

NOTICE OF APPEAL

Notice is given that Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang, plaintiffs in the above-captioned case, individually and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Memorandum Order granting defendant CoreCivic Inc.'s motion to dismiss entered in this case on September 27, 2019.

Date: October 25, 2019

Respectfully submitted,

/s/ Robert S. Libman
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One of the Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

Lisa Mecca Davis certifies that she caused the foregoing Notice to be served upon all counsel of record, by this Court's electronic-filing system, this 25th day of October, 2019.

/s/ Lisa Mecca Davis
Lisa Mecca Davis